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*Robt Williams*  
*Raleigh*

REPORTS  
OF  
CASES ADJUDGED

IN THE  
SUPERIOR COURTS OF LAW AND EQUITY,  
COURT OF CONFERENCE,  
AND  
FEDERAL COURT.

FOR  
*The State of North-Carolina ;*

FROM THE YEAR 1797 TO 1806.

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BY JOHN HAYWOOD, ESQ.  
LATE ONE OF THE JUDGES OF THE SUPERIOR COURTS OF  
LAW AND EQUITY.

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VOL. II.

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*Raleigh :*

PRINTED BY WILLIAM BOYLAN.

.....  
1806.

Rec. June 29, 1880.

# ERRATA.

*The reader will please make the following corrections with his pen.*

- PAGE 6, line 22, for 'Rosser,' read 'Ross.'
- 50, 43, for 'understanding,' read 'undertaking.'
- 54, 38, for 'grounds,' read 'grudge.'
- 56, 40, for 'the operation,' read 'this operation.'
- 57, 38, for 'operation,' read 'assertion.'
- 58, 41, for 'first part,' read 'his point.'
- 60, 8, for 'that is,' read 'that as.'
- 62, 7, for 'produced in,' read 'produced on.'
- 63, 8, for 'extent,' read 'intent.'
- 11, for 'come,' read 'came.'
- 23, for 'could,' read 'would.'
- 64, 40, for 'joint money,' read 'joint tenancy.'
- 68, 14, for 'were no payment,' read 'were payment.'
- 73, 41, for 'barrow,' read 'Burrow.'
- 98, 32, for 'never appropriated,' read 'never been appropriated.'
- 99, 22, for 'obligatory,' read 'obligatory on.'
- 109, 34, for 'Wheaton,' read 'Wheaton.'
- 122, 24, for 'diem sola,' read 'cum sola.'
- 128, 12, for 'in arrest in,' read 'in arrest of.'
- 131, 35 & 6, for 'registered,' read 'reverted.'
- 132, 2, for 'unweariness,' read 'unweariness.'
- 140, 26, for 'peine forte et dure,' read 'peine forte et dure.'
- 143, 31, for 'ought to,' read 'ought so to.'
- 144, 42, for 'required the,' read 'required the.'
- 150, 24, for 'value,' read 'value.'
- 153, 3, for 'asserted,' read 'essential.'
- 163, 34, for 'counties,' read 'countries.'
- 166, 37, for 'finis literum,' read 'finis illium.'
- 43, for 'that a will,' read 'that it a will.'
- 169, 16, for 'though admitted,' read 'who admitted.'
- 216, 32, for 'executions,' read 'executions.'
- 229, 22, for 'had been,' read 'had not been.'
- 234, 36, for 'pre-secured,' read 'presumed.'
- 235, 10 & 11, for 'continue,' read 'construe.'
- 273, 22, for 'refucient,' read 'referunt.'
- 37, for 'purchase,' read 'purchase of.'
- 274, 41, for 'moiety of,' read 'moiety on.'
- 276, 3, for 'motive,' read 'matures,' for 'really,' read 'reality,' and for 'personally,' read 'personally.'
- 288, 29, for 'alien,' read 'alien.'
- 289, 9, for 'premises,' read 'promises.'
- 11, for 'deceit,' read 'deceit.'
- 290, 20, for 'depositions taken,' read 'depositions taken.'
- 293, 12, for 'deceit,' read 'deceit.'
- 296, 1, for 'regularity,' read 'peculiarity.'
- 297, 2, for 'the term,' read 'the last term.'
- 301, 22, for 'drawing,' read 'drawing a line.'
- 304, 33, for 'signed,' read 'signed.'
- 305, 12, for 'signed,' read 'signed.'
- 27, for 'executions,' read 'executions.'
- 316, 25, for 'was necessary,' read 'was not necessary.'
- 317, 26, for 'an act,' read 'an act.'
- 318, 15, for 'the,' read 'then.'
- 32, for 'singing,' read 'singing.'
- 309, 12, for 'as,' read 'as.'
- 311, 26, for 'circumstances,' read 'instances.'
- 313, 16, for 'invasion,' read 'invasion.'
- 315, 21, for 'circumstances,' read 'circumstances.'
- 317, 42, for 'placard,' read 'placard.'
- 319, 34, for 'insisted,' read 'insisted.'
- 321, 34, for 'for this,' read 'for this that.'
- 347, 1, for 'good,' read 'good.'
- 352, 6, for 'no,' read 'no.'
- 405, 27, for 'is negligent,' read 'is sua negligentia.'



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## REPORTS, &c.

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Newbern, September, 1797.

*IRVING vs. IRVING.*

**T**HIS was a bill in equity for an injunction to stay the defendant from proceeding at law, and a commission had issued to Maryland to take the answer of the defendant, the reading of which was now opposed by Mr. Martin, because the commission for taking the answer had issued with a blank for the name of the commissioner, and had been filled up by the defendant or his counsel after it went from the office of the clerk and master:—He contended that the commissioner should have been named, and approved of by the court before the commission issued. And he cited the case of ——— vs. Mooring, in this court, where the answer was referred for impertinence and the court declared that no commission ought to issue for the future to a commissioner not previously approved of by the court.

Badger *e contra*, cited several cases in this court, as also did Taylor and others, where the answer had been taken by commission filled up as in the present case and had been received by the court.

*Per curiam*, WILLIAMS and HAYWOOD, Judges.

The practice of taking an answer upon a commission filled up by the defendant with the name of a commissioner is a dangerous one; as the defendant may name a man who will certify an answer as sworn to when in truth it was not. Such abuses have been committed with respect to commissioners to take testimony. But as this answer was taken before the Chief Justice of one of the districts of Maryland, and as the practice has been to receive answers taken before persons authorised by the laws of the country where taken to administer oaths, it is better to adhere to that practice than now to alter it.

Let the answer be read.

Edenton, October, 1797.

*Boatwell's administrators vs. Reynell and wife.*

**T**ROVER for a number of articles purchased by Boatwell in his life time at the sale of one Winburn deceased, whose widow had intermarried with Boatwell, having previously ob-

Edenton, October, 1797.

tained letters of administration on the estate of Winburn. After the purchase Boatwell died and she married Reynell, who in her right detained the articles so purchased by Boatwell, alledging that an administrator could no otherwise acquire a property in any articles belonging to the estate of his intestate than by paying the value to a creditor, which here he had not done...

The defendant's counsel cited office of executor, 89.

*Per curiam*, HAYWOOD only in court.

Boatwell in right of his wife was the vender by means of the sheriff according to the act of 1762, ch. 5, sec. 10. And it is absurd that the seller shall become the purchaser: to whom shall he give bond and sureties as required by the act?—Surely not to himself; much less to the sheriff who is only an instrument and has no interest. The goods yet remain part of the intestates' estate, and an execution issued against his assets in the hands of his administrators would attach upon them. An administrator or executor as such can no otherwise become entitled to the goods of his testator than by paying their value to creditors, as stated in the book cited.

Verdict and Judgment for defendant.

*Collins vs. Dickerson.*

**T**HE clerk and master Mr. Iredell, had issued his execution for about the sum of four hundred pounds as due for the costs of this suit, which Dickerson complained of. And the court in the beginning of this Term referred it to Mr. Blair to state to the Court the services which had been performed by Mr. Iredell. He accordingly made his report; whereupon several questions arose and were debated at the bar.

One was, whether for sums expressed in figures in recording the proceedings he should charge for as many words as would be necessary to express the sum in words at length, or whether he should charge for each sum expressed in figures as for one word.

*Per curiam*, WILLIAMS and HAYWOOD.

He shall charge as for one word for each sum expressed in figures in pounds, shillings and pence, as for instance, £. 1 10 11, expressed in figures shall be charged for as for one word.

Another question was, what should be deemed a copy sheet; that not being expressed in the act of 1787, ch. 22, sec. 3.

*Per curiam*, it is mentioned in the act of 1782, ch. 11, sec. 4, to be ninety words: the legislature meant the same thing in the act of 1787.

Halifax, October, 1797.

**G**ENERAL DAVIE moved to prove the will of Major Gerard, lately deceased; saying the estate was under such circumstances as required immediate attention before the time of

the sitting of the county court of Edgcombe where the testator resided at the time of his death.

*Per Curiam.* WILLIAMS and HAYWOOD. The act of 1789, ch. 23, sec. 1, directs the probate of wills to be in the court of the county where the deceased resided, to the end that those concerned to contest it, might know where to go to make opposition to the probate. The parties cannot know it will be offered here so cannot be prepared to oppose it here, et per HAYWOOD Judge. This court, independent of the other reason has but an appellate jurisdiction in cases of probates, by 1777, ch. 2, sec. 62 63, and for that reason cannot take probate in the first instance.

Motion denied.

*Bryant vs. Vinson. Ejectment.*

A TRACT of 640 acres had been granted, then 320 acres sold off by an uncertain description, then the remaining 300, "running along a path to a branch, then down the branch to its junction with another branch, then up the latter branch to the path, and along the path to a corner on the opposite extremity of the tract, and so around to the beginning." The bargainee of this latter tract bargained and sold to another; beginning as in the former deed and running to the branch, thence to the corner (before described) on the opposite extremity.

WILLIAMS Judge. The plaintiff's counsel contended, that by the description in the latter deed, the line was intended to run as described in the former—*down the first branch, then up the second, and thence along the path to the corner.* But the word thence is not a term of relation; it does not refer to the boundaries in the former deed. *Thence to a corner* can mean nothing but a direct line from the former to the latter point. To deviate from the former point immediately and return by another line to the direct one from that to the latter, and then along the direct line is not warranted by the term *thence to the beginning.*

HAYWOOD Judge assented; but the Jury found otherwise.

*Whitehead (Widow) vs. Clinch.*

PLAINTIFF exhibited her petition for dower under the act of 1784, ch. 22, sec. 9, and defendant pleaded. Baker, for plaintiff, insisted that the proper way for the defendant to make his defence was by way of answer on oath to the petition, whereupon the court will determine in a summary way, and the issue shall be tried by the court. Davie, for the defendant, argued strenuously that pleading the defence was the only proper way.

*Per Curiam.* Williams and Haywood Judges.—It is true some of the practices since the act of 1784, have made their defences by way of answer, it is equally true that others have made defence by pleading, and it is fit the practice should be settled.

The act of 1784 did not intend this to be an equity proceedings; it did not mean to require that the defendant should answer on oath; it alters the common law no farther than it has directly expressed by substituting the petition in place of the intricate proceedings by writ and declaration; the defence must be made and tried as before: it is absurd to say the court shall try in a summary way whether the plaintiff received satisfaction or not, or was lawfully married or not: the rules of the common law are never to be departed from but where the legislature have expressly directed it, or where it necessarily follows from what they have directed: they have not done this in the present instance; they have not required any answer on oath, and the court will not. So the jury was sworn on the pleas, and after much argument on both sides the court permitted oral evidence to be given of cohabitation in proof of the marriage notwithstanding the English authorities require a certificate of the Bishop, because there is no record kept here of marriages as in England there is, consequently no certificate of any officer can be had, and unless parol evidence be received we shall invalidate all the marriages in the country.

*Williamson, by Guardian vs. Cox.*

**T**HIS was an action of trespass, and on not guilty pleaded upon trial, the case appeared to be, that Williamson was seized of the lands in which, &c. and died seized in the year 1780, and afterwards his widow married, and her son the heir of Williamson assigned dower by metes and bounds which were specified in a deed signed by the son and his mother. Some time afterwards, Cox the second husband died, and the widow cleared the lands and cultivated them beyond those bounds. *Per Curiam*, The deed ascertaining the boundaries is not binding, being signed by the defendant during her coverture with the second husband; neither is her acceptance of dower during coverture an estoppel to her to claim more as it might have been, had the acceptance been during her widowhood, but she ought to have had a new assignment of dower if she was dissatisfied with the former; she cannot enter upon and occupy what part she pleases without assignment, and therefore her entering upon the land beyond those bounds, and clearing and cultivating them, was a trespass. Verdict for the plaintiff.

*State vs. Ingles.*

**I**NDICTMENT for a riot with others, and for beating and imprisoning Edward D. Barry. The defendant pleaded that he had been heretofore indicted in the county court of Edgcomb for an assault and battery on the said Barry, and thereon had been convicted and fined, which indictment and conviction had



been grounded on the same facts that this indictment was preferred for.

*Per Curiam.* After argument, by Baker, for the state, and White for the defendant, the truth of this plea is admitted by the demurrer; the state cannot divide an offence consisting of several trespasses into as many indictments as there are acts of trespass that would separately support an indictment and afterwards indict for the offence compounded of them all; as for instance, just to indict for an assault, then for a battery, then for imprisonment, then for a riot, then for a mayhem, &c. but upon an indictment for any of these offences the court will enquire into the concomitant facts, and receive information thereof, by way of aggravating the fine or punishment, and will proportion the same to the nature of the offence as enhanced by all these circumstances, and no indictment will afterwards lie for any of these separate facts done at the same time. This plea is a good one and must be allowed.

The plea was allowed and the defendant discharged.

Wilmington, November, 1797.

*Anonymous.*

**D**EBT upon a bond executed here, and payable to a person of South-Carolina.

*Per Curiam.* Haywood, Justice only in court.—This bond is not made payable in South-Carolina—if it were, yet as it was executed here, it shall only carry North-Carolina interest. A contract is to be interpreted according to the law of the country where made, and draws to it such legal consequences as the law of that country attaches to it. Had the bond been executed in South-Carolina, and there payable, it would undergo a different consideration.

*Cobham, assignee of Creedon vs. the executors of Neill.*

**C**ASE upon a note of hand, and the act of limitation pleaded. This action had been instituted against the testator in his life time; and after his death, was continued against his executors by *scire facias*, under the act of 1786, ch. 14, sec. 1. On the trial, the plaintiff proved an acknowledgment of the debt about a month after the assignment, the assignee then being in the country, and having gone off about a month after the acknowledgment, to Europe.

*Per Curiam.* Haywood, Justice only in court.—The plaintiff's cause of action accrued by the assignment (the original promisee being beyond sea,) the act began to run upon his demand, and continued to do so all the time he stayed here; and his withdrawing to parts beyond the sea afterwards, will not sus-

pend its operation. The saving in the act only extends to such persons as were beyond the sea at the time when the action accrued; not to such who were here when it accrues: and as he did not sue within three years after the accruing of the action, he is barred.

There was a verdict and judgment for the defendant.

*Same vs. Mosely.*

CASE upon a note of hand and the act of limitation pleaded. The note was dated and made payable in the year 1775.— This action was commenced in the year 1792, but the plaintiff proved the note was presented to Mosely not longer than a month or two before the beginning of the action—who said, “It was at the desire of my mother I gave it; I will not pay it; Rosser ought to pay it; I will speak to him about it.

*Per Curiam.* Williams and Haywood.—After the points had been reserved and argued, the latter words of this conversation, admit the debt has never been paid; the former admit the defendant’s signature. An admission of the signature, it is true, is no admission of the debt; for still it may be usurious, a gaming debt, or the money may have been paid, or it may be under some other circumstances which render it not a just debt; but when he says Rosser ought to pay it, I will speak to him about it—this shews the debt is not paid; and though he says at the same time, I will not pay it—yet being legally due from him, the law will compel him to pay it.

There was a verdict and judgment for the plaintiff.

*Cobham, assignee of Creedon vs. Administrators.*

CASE upon a note of hand, and the act of limitation pleaded: amongst other pleas. The note was executed and made payable before the war, and suit had not been commenced till long after three years of computable time had elapsed from the day of payment. Evidence was offered by the plaintiff’s counsel of an admission of the debt within three years next before the action commenced, which was objected to by the defendant’s counsel, on the ground that any exception to take the case out of the act should have been replied and notice thereby given of the particular fact relied upon to take the case out of the act, and he was about to produce authorities to that point. *Per curiam.* You need not produce cases to that effect, the law is so, and if you insist upon it, on that ground the court will reject the evidence; but the practice of the bar has been not to draw out the pleadings at length, nor to reply but when the act of limitation is pleaded; to proceed to give evidence of facts that will avoid the act, as if such facts had been replied; it is for you to consider whether insisting upon the strict rule of law at this

time be for the advancement of justice or consistent with the implied agreement amongst the practitioners, is not to take advantage for want of a replication. The plaintiff's counsel then said, if the practice had been as stated he would not infringe it, wherefore the evidence was given, which proved that the intestate in his lifetime had admitted the debt, and that after his death the note was presented to one of his administrators, who said it is the signature of the deceased and all his just debts shall be paid when the Holly Shelter lands are sold.

*Counsel for the defendant*—Here is not any admission of the existence of this debt; admission of the signature does not amount to that, for the debt may have been discharged after the signature, and three years elapsing without any demand, is presumptive evidence of payment, according to the doctrine contended for. If a bond has remained dormant twenty years, and the executor admits the hand writing, the presumption is destroyed; and supposing the debt to be admitted, it is only evidence of a new promise and for that reason only it is deemed to be out of the act of limitations; and if in fact a new promise is made by an executor, the action must be against himself in *jure proprio* and not against him as executor to charge the assets of the testator, H. Bl. Rep. 108, 114. This action is not against the executor in *jure proprio*, but upon the old foundation of the contract made by the testator and therefore the admission of the executor if it amounts to a new promise can not be applied to it; lastly the admission of one executor or administrator where there are two or more, should not be obligatory upon the others, but he may notwithstanding make any defence he thinks proper for the benefit of the estate of his testator; the rule being that where there are many executors and they sever in pleading, the best plea pleaded by any of them for the estate, shall be taken and relied upon; the other administrator may still say this is not the signature of his testator, or if it is that he has paid the debt, or is barred by the act of limitation.

*Per Curiam.* Williams and Haywood—Admission of the signature is not an absolute admission of the debt; but the admission of the signature with the addition that all his just debts shall be paid, is equivalent to saying that this debt if a just one shall be paid, which in ordinary cases would certainly avoid the act of limitations; also in ordinary cases the admission of one of several defendants would avoid the act as to all, Douglass, 652, 653; and we can see no reason why the admission of one of several executors should not have the same effect; any one of the executors may pay a just debt though barred by the act of limitations if he will, for he is not bound to take advantage of the act of limitations; such payment would be a good one and he would be allowed it on a plea of *plene administravit* as to creditors or in a settlement with legatees or next of kin; then why not also bind the assets by his promise to pay it if one of two executors should admit the debt and be sued first and plead the gene-

ral issue, that in the case of unsealed instruments would be good evidence of the debt and supersede the necessity of proving the instrument on trial; then why not take it out of the act of limitations also. As to a new promise being the ground for an action against the executor only in *jure proprio*, he may possibly be sued that way and be charged perhaps *de bonis propriis*; for it has been sometimes held that a new promise is not only evidence of the old debt, but also of assets to pay it, at least it is so laid down in many of the old books, but that does not prove that the old cause of action is extinguished, and that no action will lie against the executor as executor, after such new promise.—With respect to the act of limitations, the bar does not proceed upon the idea that the old debt is extinguished for an admission of the debt after the action commenced will avoid the bar, 2 Bur. 1099; the act was intended to operate where a presumption of payment could fairly be raised from acquiescence for a considerable length of time that the debt was paid, which presumption remains not after a recent acknowledgment of the debt; an acknowledgment or new promise, gives not a new cause of action only to be used as a substitute for the old, but removes the presumption of payment which is an obstacle opposed by the act to the plaintiff's recovery on the old cause of action.

There was a verdict for the plaintiff and a motion for a new trial, and a rule made in order that the above points might be again argued and maturely considered; and on the day appointed to shew cause the above points were again argued on both sides, & the court gave the same opinion as before—upon the latter argument a new point was made; it was argued that if here was a promise to pay, it was conditional, and to take effect when the Holly Shelter lands were sold and cannot be obligatory before that event takes place which as yet it has not, the Holly Shelter lands being not yet sold.

*Per Curiam*—In this conversation there are two branches; the one admits the debt if it be a just one, the other relates to payment to be made out of a particular fund. All that is material as to the act of limitations, is the admission of the debt; for upon that the law says it shall be paid out of the personal estate, and it is to no purpose for the executor to say he will pay out of the real, over which he has no controul. Here is no evidence to impeach the justness of the debt; his signature may well stand as evidence of that originally till the contrary be shewn, though the signature alone may not be evidence that it is a subsisting debt.

The rule discharged.

*Fitzpatrick vs. Neal.*

**D**UNCAN was elected by letter from Fitzpatrick, to cause Neal to be arrested for a debt due to him should he arrive

at Wilmington. Neal was arrested accordingly, and imprisoned; and now Neal being brought up as upon a *habeas corpus*, moved by his counsel, to be discharged, because Duncan had not a letter of attorney under seal. The counsel argued that every letter of attorney for the purpose of causing an arrest, or recovering a debtor the like, should be under seal, in order that he who gives the power may be estopped to say he did not give it, and so charge the defendant again as he might do if the attorney or agent acted without proper authority; and in a case like the present where a suit is carried on in the name of the principal, the power should be filed amongst the records of the court, and should be duly authenticated, otherwise a bar or recovery in this action could not be effectually pleaded against a new action for the same cause; the principal might say he gave no power to commence any such action as the former, which if true would avoid the plea; the principal could not be bound by his acts, for otherwise debtors might come here and cause themselves to be sued by their friends and have a judgment of the court in their favour, and become discharged of their just debts. And to prove that letters of attorney should be under seal, they cited Cok. Litt. 52. 1. Ba. Ab. 198, 2 Roll. Ab. 8.

*Williams*, Justice.—For the reasons given at the bar, I am of opinion the authority given by this letter is insufficient.

*Haywood*, Justice.—Powers of attorney to attorneys at law, to sue or defend, are always without seal, unless given by corporations who can only act by their common seal: these attorneys may enter satisfaction on record, receive the monies due, cause arrests to be made, and do many other acts; on the contrary, all the instances that in West and other books, of letters of attorney to private persons, are under seal, which, to be sure, is some argument that the law requires them to be so, but why a seal in the latter case is necessary when in the former it is not, I cannot well see any good reason—I will consider further of it at another day. This case being again moved, Judge Williams gave the judgment of the court, that the defendant be discharged from his imprisonment, the authority to Duncan to cause the arrest not being sufficient for want of a seal.

He was discharged accordingly.

*Young vs. Irwin*.—Ejectment.

THE land in question, was granted by the King to Solomon and James Ogden on the 20th of February, 1735; they conveyed to Clark in 1737, and he to Gabriel Johnston in 1738.—Johnston devised in 1751, that his executors should sell; his widow being his executrix, intermarried with Rutherford, and they conveyed to Orme in 1754, who in the same year re-conveyed to Rutherford, who in 1763 conveyed to Duncan, and he in the same year re-conveyed them. Rutherford in 1773, pur-

suant to a decree of the court of Chancery, conveyed to Murray, and in 1774 Murray conveyed to Young, who died, leaving the plaintiff his heir; but before the decree, Rutherford contracted for a sum of money to sell to Irwin, and to convey when he should have paid the consideration money.—Irwin in 1757, made his will and died. He left Rutherford his executor, and it was proven that Rutherford wrote his will: he directed money to be raised out of his personal estate to discharge the debt due for the land, and then devised it to his sons John and James: he died in possession, which he took, pursuant to the contract. Some time in the year 1753, Rutherford as executor, took the whole personal estate, to a much larger value than the debt in question, but said he had expended it in the payment of debts; what was the precise amount either of the personal estate, or debts of the deceased, did not appear.

*Taylor*, for the plaintiff, rested his case here; saying he had deduced the title from the original patentee to the lessor of the plaintiff, and should expect a verdict unless some material objection, more than he could at present foresee, should be stated against the plaintiff's title.

The counsel for the defendant argued, that the lessor of the plaintiff should shew himself to have been in possession within seven years, otherwise he is not entitled to recover in ejectment. He cited Bull. N. P. 102, and other books, to establish the same doctrine. Secondly, he argued that an adverse possession in the defendant for the space of seven years, without any colorable title, will take away the plaintiff's right of entry; and that here was such an adverse possession for forty-three years and upwards; during all that time, the land in question has been occupied by the defendant and his ancestor, who have claimed the same as their own, pursuant to their contract with Rutherford. Irwin the ancestor, did not, as suggested by the court, take possession as a tenant at will. 2. Bl. Com. 145. An estate at will, is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor. If the tenant by force of this lease obtain possession, the lessor may determine his will and put him out when he pleases—Did Irwin enter under any such condition? Was it understood that he was to be turned out whenever Rutherford pleased? No! he took possession of the land, to be enjoyed as an inheritance never to be turned out of possession if he paid the purchase money; and this he did pay, for he charged his personal estate with it; and Rutherford, who was the debtee, in his capacity of executor received more than enough of the personal estate, and so by operation of law was paid; and then it is not only against all equity, but also against the express stipulation of Rutherford, under whom the plaintiff claims, that the defendant should be turned out of possession. Thirdly, if colour of title is necessary to accompany

a seven years possession, in order to form a right of possession in the defendant and create a bar against the plaintiff's claim, then here is the will of the ancestor proven in the year 1760 and made in the year 1757, and a possession under it in the devisees from that time to the present.

*Taylor* replied.

*Per Curiam.* Haywood, Justice only in court.—After stating the facts as they were proven on the trial:—The legal title has been regularly deduced from the original proprietor to the lesser of the plaintiff, and he is entitled to recover in this action unless barred by the act of limitations, or by *Rutherford's* sale, or the joint operation of both. With respect to the contract to sell and the taking possession in consequence thereof, by the permission of the vender; if that be considered independent of any concomitant or subsequent circumstances, it can give no title whatsoever; the land could not pass nor any estate in it upon the making of the contract and taking possession pursuant to it by the vender's consent. A deed properly executed and registered, is at least required to pass an estate of inheritance in this country; and this to avoid the danger of claiming estates as passed from the owner's verbal testimony, and of turning men out of their estates and possessions, by corrupt witnesses.—When a purchaser in a case like the present, takes possession, he takes it by consent of the owner, and may continue it until he fails in payment, and then is liable at law to be turned out: he does not take a tortious possession and gain a tortious fee, as has been contended: if he is not strictly speaking, a tenant at will, his possession is that of the owner, and not a distinct independent possession opposed to his: if he is ousted of possession by a stranger, he cannot regain it by an action in his own name, but only in an action which sets up and affirms the vender's title. Such possession of the purchaser is therefore not an adverse possession to the vender; and if by the act of limitations, an adverse possession is necessary to bar the plaintiff's title, such an one as has been in the present case, will not answer that description. Under the act of limitations, it is very true the English Law Books require the plaintiff in ejectment to prove himself to have been in possession within twenty years; but by our law he need not be in actual possession within seven years: if he has a title by deed or grant, he has a constructive possession by operation of law, which preserves his right of entry, until it be destroyed by an actual adverse possession, continued for seven years together, if he has never seen his land—if he has not entered upon it for fifty years, his title may be good, if his adversary hath not been in possession for seven years continually, during the whole time with a colour of title. The act of limitations operates between individuals having different grants of the same lands, or claiming by mesne conveyances under them, where

there were two such claimants. The legislature in the year 1715, when this country was a wilderness, and the great object was to procure settlers, thought it more politic to prefer a patentee or a grantee under him who had actually settled upon his land and continued in possession for seven years, than another who had not settled upon the land, though he had a prior grant or deed; but it did not mean to give any preference to an usurper who settled upon the King's or proprietors' land, without obtaining a title at all or paying for it; or who settled upon the lands of an individual proprietor, knowing he was a trespasser in doing so, which he must have known if he had no colourable title. It is argued that the will of old Irwin was a colour of title in his devisees—in some cases perhaps, a will may be so considered: it cannot, however, in the present case, because this will expressly takes notice that the title was in Rutherford, and provided for the obtaining a title by payment of the money—so here is neither an adverse possession nor colour of title, both which are necessary to accompany a seven year's possession, in order to give a title to the defendant.

There was a verdict and judgment for the plaintiff.

*Dudley vs. Ruth Strange.*

**EJECTMENT** and not guilty pleaded; and upon the trial the evidence was—that the lands in question were included within marked lines, and were settled upwards of sixty years ago, by one S. Williams, who conveyed to Ellemore Anderson, who died possessed, devising it to his two sons, who conveyed to Matthias Strange, who died some years ago, leaving the defendant his widow; she, jointly with her son, took out letters of administration on the effects of Matthias Strange, and she also obtained a state grant for the premises, dated 23d of November, 1796: a patent sworn to have been granted to Williams, on the 14th of September, 1737, is lost. Matthias Strange in his life time, was indebted to Dudley, the lessor of the plaintiff, in a considerable sum; and in January, 1789, the administrators confessed a judgment, and the land was levied on: the heirs of Strange were cited to—April, 1789, to choose guardians; and James Strange, one of the administrators, and eldest son of the deceased, was appointed guardian, *pro tempore*. In April, 1790, an issue was tried between the heirs and administrators, upon the plea, that the latter had fully administered, and it was found for the administrators: then there was a judgment against the lands—an execution issued against the lands in the hands of the administrators, stating them to be the defendants: and pursuant thereto, the lands in question were sold by the sheriff and purchased by the plaintiff: the Sheriff executed a deed to him, dated the 25th of June, 1791.

*Per curiam.*—Williams and Haywood. After argument by



Moore for the plaintiff, and Wright for the defendant, who used the same arguments the court went upon, and took notice of in giving their opinion. The appropriation of the premises in question, by an original patent or grant, is actually proven by a witness who saw it and surveyed the land by it, taking down the name of the grantee and the date of the grant in writing—besides that the land is designated by marked and visible boundaries, and has been possessed for sixty years. This at the common law is evidence of a grant; and under the act of Assembly, gives title against the state, where there is a colour of title with twenty one years possession. Anderson had a conveyance from Williams; and he and those claiming under him, were possessed under it for that length of time and more. As to this point, therefore, we have no doubt but that Matthias Strange had title at the time of his death: his administrators confessed a judgment, and this bound them either to find personal assets, or pay the money out of their own pockets. But the Court of Equity for Newbern district, upon some equitable circumstances, disclosed in a bill preferred by the administrators, have decreed that no advantage shall be taken of their omission to plead *plene administravit*: the heirs then summoned to put this fact in issue, did so and a *plene administravit*, was found so as now to appear of record, and there is a judgment now remaining in full force against the land; this judgment warrants a sale of the land to satisfy the plaintiff's debt, but no such sale ever took place: the sheriff sold to the lessor of the plaintiff by virtue of an execution issued against the administrators; whereas the judgment is against the heirs; it commanded the sheriff to levy the debt on the lands in the hands of the administrators, whereas the judgment condemns the lands descended to the heirs at law and in their possession—there is no judgment therefore to warrant the execution by which this land was sold; neither did the execution command a sale of the lands now in dispute, and the sheriff has sold them without any authority.

There was a verdict and judgment for the defendant.

*Quere.*—What judgment the court would have given, had the *feri facias* commanded the sheriff to levy the debt of the lands and tenements in the hands of the heirs, and there had not been any judgment produced? Would the vender have recovered as a purchaser under a *feri facias* issued to and executed by the proper officer; or must he also have shown a judgment. The *feri facias* justifies the sheriff though the judgment was void, or be vacated afterwards, or be reversed at the time, except in the instance where he sells goods claimed by a third person which are alledged to have been fraudulently transferred to him by the debtor in illusion of the judgment; but it will not justify the plaintiff, who should not cause it to issue, if the judgment be void or vacatable for irregularity, or be reversed; neither will any stran-

ger be justified by the *fieri facias* alone. Salk. 409, 2. Bl. Re. 1104.

*Samuel Noble vs. the Executors of Howard.*

**N**OBLE has a judgment in Fayette superior court against the executors of Howard, and they have a judgment in this court against him, and this is a *scire facias* against them to shew cause why Noble's judgment should not be set against theirs, and they to have execution for the balance, if any : and it is now stated in court that the estate of Howard is insolvent, and if the executors are permitted to levy their debt, Noble will probably not be able to get the amount of his judgment refunded by having it levied against them, in support of the *sci. fa.*

Mr. Moore, for the plaintiff, cited 2. Burr. 1229, Baskerville vs. Brown, and Barker's administratrix vs. Brohim, 2. Bl. Rep. 869.

*Taylor e contra.*—There is no new case to shew that a judgment in one court as this is shall be deducted out of the amount of a judgment in another. The last case cited, is indeed of judgments in the courts of common pleas and kings bench, and the one being deducted from the other ; but these courts set under the same roof. In the cases now before the court, they are the judgment of two different courts, sitting for two distinct and separate districts.

*Per curiam.* Williams and Haywood.—The reason of the thing is the same in both cases ; the common pleas is as much a distinct court from the king's bench as two superior courts held for different districts. Let the judgment in Fayette be deducted from the judgment here as prayed by the *scire facias* and, execution issue for the balance only.

*Anonymous.*

**P**ER Curiam—Haywood, Justice, only present. Upon the plea of *plene administravit*, the defendant begins by shewing an administration of something, which if he does, then the plaintiff must prove by the inventory or otherwise, assets to a greater amount than is proven to be administered ; and this is evident if we will but consider the pleadings. The defendant says he fully administered, or hath fully administered all except so much. The plaintiff replies he has assets enough to satisfy his demand, or assets enough besides these confessed, &c. and upon this, issue is joined ; the affirmative comes from the plaintiff in his replication, and the joining of issue is upon that ; in the nature of things it cannot be otherwise ; for suppose it incumbent on the defendant to prove a full administration, and he proves one of twenty shillings, when in fact the estate is worth ten thousand pounds, will not this drive the plaintiff to give evidence, charging him with further assets. *Vide* Lill. ent. 475, 2 Bl. rep. 1105, Salk.

296, 1 Mo. Ent. 450, Comb. 342, Godol. 175, Cro. Rep. part. 3, case 171, Godol. 176.

*Corse and Skepton vs. George Ledbetter.*

**P**LEA in abatement that they resided out of this state, and Ledbetter was an inhabitant of the district of Morgan: and to this there was a demurrer, and assigned to be for want of an affidavit of the facts stated in the plea.

*Per curiam.*—The proper way is not to demur as is done here; for a demurrer is mute and cannot advance a new fact, as is attempted here: you should have moved the court not to allow the plea to be received as a plea—the matter pleaded is sufficient; but as the counsel agree that the validity of the plea shall be decided upon without regard to the form of opposing it, let it be over-ruled and the defendant answer over.

*Langdon and Ward vs. John Troy.*

**H**E executed a writ as sheriff, upon a defendant sued by these plaintiffs, and returned the writ without a bail bond; whereby he became answerable as bail himself. There was judgment against the defendant, and a *capias ad satisfaciendum* against him, returned *non est inventus*; and this is a *scire facias* to charge Troy as bail; the defendant demurred generally; and his counsel now argued that the *sci. fa.* is in the nature of a declaration and should state all circumstances material and necessary to support the plaintiff's demand. And this *scire facias* does not state that any *ca. sa.* ever issued, which is expressly required by the act of 1777, ch. 2, sec. 19. And of this opinion the court seemed to be, but ordered precedents to be searched; and on this day Mr. Jocelyn, for the plaintiff, produced the entry of a *sci. fa.* against bail, in the case of Atkinson vs. Wilcox, in Lilley's Entries, 307; and divers other cases from same book, where no mention is made of the *ca. sa.*

*Per curiam.* The return of the *ca. sa.* is equally necessary in England as it is here; and the want of it may be made an exception, but it must be stated in the defendant's plea—we will not change the precedents, therefore let judgment be for the plaintiff.

*Vide 2 Co. Inst. 184, 187.*

*The Executors of Emmett vs. E. & W. Stedman.*

**T**HIS was a *sci. fa.* against the defendants, to shew cause why the plaintiffs should not have execution *de bonis propriis*, to which they pleaded no assets; *plene administravit* and *in nullo decastravit*, to which there was a demurrer and joinder. The defendants were sued in the first action as executors, by a *sci. fa.* issued upon the death of their testator; and on coming into court upon the *sci. fa.* they pleaded the general issue, statutes of

limitations and *plene administravit*, and the jury found a verdict in favor of the plaintiffs, affirming the assumpsit within three years, but found nothing as to the *plene administravit*.

*Per curiam.* The finding was imperfect, and no judgment should have been entered upon it; but since it was entered, and there is no mode of reversing it, being a judgment of the superior court, though clearly erroneous, the defendants *ex necessitate* must be allowed to plead the same matter to this *sci. fa.* to discharge their own goods, though they would not be entitled to such a plea now, had they not pleaded it to the first action—however, the plea now put in must relate to the teste of the process by which they were first brought into court, and must state a full administration and no assets at that time.

*Joshua G. Wright, Administrator, &c. vs. John Walker.*

**C**ASE upon a warranty on the sale of negroes to the intestate; which negroes were gotten out of his possession by the guardian of two orphan children, by the name of Scull, he claiming them as the property of the children;—whereupon, an action of trover was brought by the intestate against the guardian, for the recovery of these negroes; and there was a verdict for the defendant, upon the plea of not guilty.

*Per curiam.* Williams and Haywood, Justices.—A recovery in trover vests the property in the defendant; and a bar in trover or verdict for the defendant, is *prima facie*, and most generally a proof of property in him: It is not however, conclusive, as such verdict may have been upon the ground, that the defendant had not possession of the thing, and so had not then converted or held possession, having a lien upon the thing until paid for the work he had done upon it; or because he may have had a particular interest in the thing for years, or the like, which has since expired. In all these cases and others that might be instanced, the defendant would be entitled to a verdict; and yet the plaintiff in an after action, be entitled to recover as having the property. A verdict for the defendant is therefore, only *prima facie* evidence of property in him, which will stand till the contrary be proven, by shewing the particular fact in evidence that occasioned the verdict to be for the defendant.

There was a verdict and judgment for the plaintiff.

*Vide* 6 Re. 7. Cro. El. 667. 5 Re. 61. 1 Mo. 207. 2 BL. Re. 779, 831.

*Walker & Younger vs. Lewis & Bingsford, Bail for Fleming.*

**T**HIS was a *sci. fa.* to have judgment and execution against the defendants, as bail for Fleming, against whom the plaintiffs had recovered judgment and taken out a *ca. sa.* which had been returned *non est inventus*: and to this *sci. fa.* the defend-

ants pleaded *nul tiel* record, the paper supposed to be a bail bond, and relied on as such by the plaintiffs, when produced, appeared to have all the forms of a bail bond, except the seal which it had not.

*Per curiam*—This is a fatal variance; the *sci. fa.* states a bail bond as the ground of this proceeding, and by the act the *sci. fa.* can only issue to charge them as bail when they have executed a bond, and that is returned and filed amongst the records of the court, 1777, ch. 2, sec. 16, 18, 19. Here it wants a circumstance material to the essence of a bond.

The court adjudged there was no such record.

*Anonymous.*

*PER curiam.* In calculating interest, the payment must first be applied, to discharge the interest accrued at the time of payment; and the excess of the payment, if any, carried to the reduction of the principal. The same directions were given in every case where the calculation of interest came in question during this term.

*Ballard vs. Averitt.*

*SCI. fa.* to shew cause why the plaintiff should not have execution against him upon a judgment formerly recovered in this court; to this *sci. fa.* the defendant pleaded that he had been heretofore arrested by virtue of a *capias ad satisfaciendum* issued upon that judgment. The plaintiff demurred, and the defendant joined in demurrer: after argument by Jotelyn for the plaintiff, and Moore for the defendant:

*Per curiam*—If the defendant were arrested and discharged by the plaintiff's consent, the plaintiff cannot now have a new execution against him; if he were arrested and escaped by the neglect or permission of the sheriff, the plaintiff may have a new execution against him, though in the latter case the sheriff could not arrest him and hold him in custody upon the old writ; or if he had died in execution, the plaintiff might now have a new execution. The fact as stated at the bar is, that he was arrested and discharged by the sheriff, there being no gaol in the county to confine him in: this is not put upon the record by the pleadings, but if it were it could not have much weight, as there is a provision by act of assembly for such a case, directing the sheriff to confine him in the district gaol; in strictness, the plea should disclose all such circumstances as are essential to make out the defendant's right to be discharged from the execution prayed for by this *sci. fa.* The pleadings here, however, are not drawn out at length, so that we cannot discover precisely what is the defence intended to be set up; we would advise that the pleadings be amended so as to state completely the facts relied upon by the defendant, and this was agreed to.

*Et sic adjournatur.* 3 Re. 52. Salk. 271. 2 Mo. 136. 5 Re. 87, 6.

*Toomer vs. Long.*

**CASE.** The defendant pleaded the act of limitations ; and there was at the last term a verdict for him and a motion for a new trial, being as the plaintiff's counsel alledged, a verdict against evidence.

Judge *Williams* reported the evidence to have been, that Toomer's attorney applied to the defendant for satisfaction for some certificates he had received of the plaintiff soon after the war ; who answered, " I have credited him in my account with the value of the certificates, if he will meet me at Newbern I will settle with him ;" and he further reported that Judge M'Cay and himself took time at the last term to consider of the motion for a new trial, and after the term, had both agreed that a new trial should be granted ; and he was now of opinion the verdict should be set aside and a new trial granted.

*Haywood, Justice.* "I will settle with him," imports a promise to pay that balance, if any ; for what purpose would he settle and ascertain the balance, unless for the purpose of paying it, should it be found against him ?

A new trial granted on payment of all costs.

*Anonymous.*

**IT** became a question in this case, whether an administrator *de bonis non*, may sue upon a bond taken by the former administrator, for goods sold which were the deceased's, in the name of himself as administrator. It was objected the bond was not any part of the assets of the deceased, and cannot be sued in the name of the administrator ; for that when an executor or administrator sells the effects of the deceased, he is liable for the value ; he is chargeable, for all the assets every where that may be reduced into his possession before the sale of them, and taking a bond for the price ; and the counsel cited 2 Ba. Ab. 441. L. Ray, 437, 865, 1215, 1413.

*E contra,* It was argued, that although the contract sued upon was after the death of the intestate, the administrator may sue as administrator even by the common law, 1 Term 487. When it was held that executors might sue as executors upon a bill of exchange, endorsed to them in that character, for a debt due to the testator, and *a fortiori* must the law be so here where the executor or administrator is directed by a positive act to sell by the sheriff at public auction upon six months credit, and to take bond with sureties, 1723, ch. 10, sec. 2. 1762, ch. 5, sec. 10, altered so far as regards a testator's estate, to be sold by the sheriff ; and for what purpose must he take bond unless it be to se-

cure the interest of the legatees or creditors—it cannot be so directed for the benefit of the executors; he might have taken that or any other mode to secure payment to himself that he might think proper, without the aid of these acts; and if the bond is for the benefit of creditors or legatees or sharers, then it follows that such bonds are to be considered as part of the deceased's estate, otherwise legatees or creditors could not resort to the sureties, nor have any benefit from this provision. Such evidently is the law with respect to guardians, when they sell the perishable estate of their wards and take bonds with sureties; they may by the express provision of the act, discharge themselves of the estate come to their hands, by rendering the bonds to the ward when of age, or to a subsequent guardian. Executors and administrators seem to have been out of this provision, more by mistake than from any design; for the clause sets out with naming all of them together. If these bonds taken by executors and administrators, are a part of the estate of the deceased, then an administrator *de bonis non* is entitled to take them into his possession and to sue for the monies as a part of the estate, and they will be assets when recovered and received, and not before; and the action commenced for this purpose must be in that character in which he claims and is entitled to them.

*Williams, Justice.*—However the law might have been formerly, such bonds taken by executors or administrators, are now a part of the estate of the deceased, and are only assets when the money is received; the obligors and sureties may become insolvent, without any default of the executor, before a recovery can be effected; it would be very unreasonable if he were to be made a warrantor of all the bonds he takes in the execution of a duty prescribed to him by an express law.

*Haywood, Justice.*—With respect to the rule of the common law upon this subject, there can be no doubt; every contract entirely and wholly originating after the testator's death made with his executors, is a contract which they do not succeed to, and therefore must sue in *jure proprio*. 4 term 277, 5 term 284, L. Ray. 436 437. Salk. 207, 6 Mo. 181, Godol. 155, where the thing to be recovered by the action will be assets when recovered and not before, the action must be as executor, but if it be assets already, and whether he recover or not, he need not sue as executor, 6 Mo. 94. Now all the effects of a testator actually come to the hands of an executor are assets rendering him liable to answer the value to legatees and creditors, unless he can excuse himself, either by shewing that the effects were lost or impaired in value without any default in him, as if destroyed by enemies, flood, lightning or the like, or if insolvent trespassers come and destroy the goods without any default or neglect in him; or if a debtor in an obligation made to the testator, be insolvent, or become so before the monies can be recovered of him, these and the like

cases will form an excuse for him and exonerate him, either of the whole value or of part, according as the proof is ; but still the proof lies upon him, it being better to require it of him than of the legatees or creditors (the first of whom may be infants and the latter perhaps living at a distance) to give proof of more having come to his hands of the value of any article than he admits, he might, and it is to be feared would, in many instances, charge himself with smaller sums than did come to his hands, and throw it upon them to prove the circumstances of each particular article, of which in most instances they could not know any thing, Office Ex. 110, 113, 115. Then if all the effects which actually come to the hands of the executor be assets, he is at the common law *prima facie* chargeable with that value, and if he sell or waste or otherwise dispose of them, he is still liable not for what he may have gotten, but for the value, and his sale of them is of no consideration to the legatees and creditors, they not being at all concerned in the contracts he may think proper to make—they are his own—they affect him only, and he only can claim the performance of them. If the executor take a new security for a debt due to the testator, he extinguishes the old demand and becomes liable, and therefore shall sue in his own name, 2 Ba. Ab. 441. By a parity of reason, if he sells the testator's goods, and takes a bond or promise instead of the possession of the goods, he shall be liable and the same consequences follow ; this being the old law, the question arises, has it been altered by the acts of Assembly ? I think they have not altered the old law in this respect ; the first of them was made to restrain abuses practised by executors and administrators, who had the goods appraised frequently at an undervalue, and so wronged the legatees and creditors ; this is recited in the preamble of the act, and is then said to be " to the great detriment of the creditors and kindred," and the act itself alters this for the future, by directing a public advertisement at the courthouse, a public sale to the highest bidder, and a return of the account of sales by the executor on oath ; those provisions have one only object, namely that of preventing the selling of the goods or keeping them by the executor at an undervalue ; the other act adds, that the sale shall be made by the sheriff, on a credit of six months, and that bonds with sureties shall be taken. Is all this to favour the executor ? To alter the law so as to render him less liable than before ? No, surely ; it was to take from him the probability of abusing his trust, by diminishing the value of the estate ; before the act he might take the goods at their appraised undervalue, now the appraisement is done away ; he might sell privately to a friend or trustee, now he cannot ; he might sell for ready money, now he cannot ; before the last act and after the first, he might sell at public auction himself, or by an agent of his own appointment, but now only by the sheriff.



a public sworn officer, entrusted by the law to enhance the price as much as possible, and he is now to sell on six months credit; those provisions are all of them directed against the power to commit abuses, and had not in view in any instance to alter the law in favour of the executor.—But why take bond and security? for this reason; that being directed to sell upon credit, it would have been a legal excuse for him if the vendee became insolvent before the day of payment; to take from him this excuse he is directed to take sureties, so that if the vendee became insolvent, he might be told to resort to them, and so be without excuse for not having the value of the goods sold. The latter act did not intend to put it in his power to say to a legatee or creditor, though I once had the goods I sold them and took bond and sureties and here it is. As to an executor or administrator discharging himself by a tender of the bonds, that is designedly left out of the act, though that provision is expressly made for guardians.—And why left out in these cases?—Because executors and administrators must collect and pay debts, and settle the estate with those monies, which guardians are not to do.—These acts limit the discretionary power which executors and administrators had before, and which might be exerted to the prejudice of the estate, in the several instances before mentioned; but they do not enlarge this provision or diminish their liability in any one instance, and consequently the executor must be liable for the goods come to his hands, since these acts in the same manner as before; he had the power to sell before and might sell in any way he thought proper; he may sell still, but when he sells he must do it as the acts direct, so as to exclude the possibility or the suspicion that the goods have been sold for less than their value; this is the meaning of the acts. If before the acts he had sold on credit, he must have sued in his own name, and the bonds would have gone to his executors, and if the obligors or sureties were insolvent at the date of the bond or were then likely to become so, or have become so since, his estate will be liable for the amount and must pay it, unless they can prove what in law will excuse them, which is far more equitable than to say the administrator *de bonis non*, shall take the bond, and that it is a part of the deceased's estate, and that the administrator must sue upon it, and in case of his being able to recover or obtain nothing, that then he shall be turned round to sue the estate of the first administrator or executor, and to prove the debtor's insolvency at the date of the bond, before he can be allowed to recover. I will, however, think further of this question, as the opinion I am now of, seems to be against that of Judge *Williams*, and also against what I have heard some of the most respectable of the profession express.

*sic adjournatur.*

*Craik's Administrators vs. Clark.*

**T**HE bill stated, that Craik in his life borrowed of Clark five hundred dollars, and mortgaged several negroes as a security for the repayment of that sum with interest, and afterwards both died, and that Craik's administrators since his death had tendered the principal sum and interest; the answer stated that Craik in his lifetime was further indebted to Clark in the sum of one hundred pounds, not secured by mortgage and that the plaintiffs ought not to be permitted to redeem without payment of that sum also: the plaintiffs replied, that they themselves were creditors of Craik, and entitled to be paid by retainer in preference to any other creditor.

*Haywood, Judge.*—An heir cannot redeem without payment of a specialty debt by the English law, because when he redeems he instantly has assets to satisfy the specialty debt, but I do not recollect any case to shew the executors are in the same situation; they would, it is true, have assets upon redeeming, but those assets may be liable to debts of a superior nature to that of the mortgage; and the thing redeemed, though assets, might not be assets applicable to the satisfaction of the mortgagee's debt. We will delay giving an opinion for the present, but it may be mentioned again to-morrow.

The next day Mr. Moore cited 1 P. W. 776, and some cases from Powell on Contracts, and thereupon the court decreed a redemption upon payment of the mortgage money, and of the hundred pounds with interest upon both sums.

*Regula Generalis.*

**T**HE court made this general rule:—when it shall be referred to the master to state an account, he shall, if possible make his report two months before the ensuing term, and shall give copies thereof to the parties, and the party excepting to the report shall file his exceptions and serve the adverse party with a copy at least a fortnight before the term, and no exceptions shall be allowed of after the commencement of the term but by leave of the court.

This order was to obviate the inconvenience resulting from the practice of filing exceptions in term time, and sometimes on the first or second Equity day when it was too late for the opposite party to prepare to argue them; and also from the practice of praying time to file exceptions which was looked upon as a matter to be granted by the court of course, whereby great delay took place.

*Anderson's Administrator vs. ———*

**A**NDERSON died, and the defendant applied to the county court of New-Hanover for administration, who ordered letters to be issued to him, he giving bond, &c. He never gave

the bond, but took possession of the effects of the intestate ; some of them he sold and took bonds for ; the others he retained, having first exposed them to sale and bid them off himself : then letters of administration were granted to Hooper and two others, who gave bond and security, and filed a bill in Equity, stating that the defendant was wasting the goods and effects of the intestate, and was receiving the debts due upon the bonds, and was about to retire in a short time to Ireland.

Judge *Haywood*, in the vacation, granted an injunction against his receiving any more of the bond debts, but refused to grant a sequestration as to the goods in specie, until the sitting of the court : And now at this term, affidavits were produced in support of the charge of wasting the effects, and of the defendant being about to remove immediately to Ireland ; and the court upon the precedents of *Barrow* and *Barrow*, and a case in this court in the spring circuit in 1796, ordered such sequestration to issue, and the effects in specie to be taken into the possession of the sequestrators, and retained by them till the defendant should give security to abide the event of the suit absolutely ; and in case of his not giving such security, they were empowered to sell the effects, taking bond with sufficient securities for the purchase money ; also they were empowered to take possession of the bonds, and to bring suit for the monies due thereon, and to keep all the said monies in their hands till the further order of the court. And the court said, though the defendant had bid off the effects now remaining in specie in his hands, that had made no alteration of the property, they were still part of the estate of the deceased.

*Walker & Younger vs. Dickerson & Routledge.*

**T**HIS was an action of debt upon a bond which one partner had signed with the names of himself and partner—objected that one could not sign for the other:

*Haywood*, Judge. A similar objection prevailed in a case reported by *Dallas*, 120 ; and the same doctrine seems to be hinted at in 1 Term, 313. I am, however, of opinion, when two persons enter into partnership, it is understood by them and also by others to whom their partnership is known, that they are reciprocally empowered the one by the other to sign the name of that other to all obligatory instruments, occasioned by their joint concern, as much so as if he had been expressly appointed an attorney by the other to execute that bond in his name, and then the bond is well executed to bind both.

There was a verdict and judgment for the plaintiff.

*Vide, Watson, 110.*

*Whitfield & Brown vs. Anthony Walk.*

**A**CTION on the case, upon an account for goods, wares and merchandize sold and delivered ; the entries were made in the hand-writing of a clerk now in South-Carolina.

*Williams, Judge.* It was decided some time ago at Fayetteville, in a case similar to the present, that such testimony as is now offered, namely, proof of the hand-writing of the clerk and his absence from this state, was admissible ; but the contrary has been decided since by the opinion of the greater part of the judges in this state, therefore it cannot be received.

*Judge Haywood* assented.

The plaintiff then gave other evidence and had a verdict.

*McNeil vs. Colquhoun & Ritchie, Co-partners with Auley M<sup>r</sup>. Naughton & Co.*

**T**HE plaintiff in this action, had commenced the same by attachment, and the following circumstances were disclosed by the garnishee on his examination, to wit : that one of the defendants was one of the partners of a company, who in Scotland had been declared bankrupts, and their estates put into the hands of sequestrators ; and the defendant, one of the partners here, at the time of the sequestration in Scotland, had goods on hand here and debts due to a large amount ; that the sequestrators in Scotland appointed the garnishee in this action to be their agent, to get possession of the goods here, and also to collect and recover the debts here for the sequestrators ; and that the garnishee had received into his possession, goods to a large amount and part of the debts, and was about to receive others to a much larger amount than would satisfy the plaintiff's demand.

*Counsel for the plaintiff.*—The statutes of bankruptcy in England or Scotland, cannot affect the debts and specific articles of property belonging to the partnership which are in this country ; for notwithstanding the sequestration or assignment of the bankrupt's effects, an action in this country to recover the partnership debts, must be in the name of the partners and not of the assignees or sequestrators. When the agent of creditors in a foreign country, or the creditors themselves, come here, and get possession of the effects of a debtor by his consent in satisfaction of their demands, perhaps no other creditor can afterwards be allowed to say these effects did not vest in the foreign creditors, and then they cannot be attached as the property of the debtor. *Solomons vs. Ross* and others, noticed in the note to the report of H. Bl. 130, seems to go upon the distinction that assignees of a bankrupt are only entitled to the balance remaining in a foreign country, after the creditors there are satisfied : they cannot mean to assert unconditionally, that the assignees have a right to collect debts here, and to force the creditors here to come in only

for a share and proportion of their debts, and that too by first applying in England or Scotland for an allowance ; that would be indeed to subject the people of this country to the operation of foreign laws, and to submit the rights and interests of our own citizens to the decisions of foreign forums, and to a defalcation from their just demands, merely and solely for the benefit of foreigners.

Policy requires we should procure satisfaction of their just demands in the first place to our own citizens, when the means of doing so, and the fund to which they trusted are within our power, and then to foreigners who have credited in their own country to the funds which they saw there. Justice does not demand that we shall let foreigners of this description into an equal participation of the benefits of our laws with our own citizens, when such an equality is to be productive of loss to them. If these cases are to be understood otherwise, I should not hesitate to pronounce them unfit for our adoption. The case in Douglass, 170, and 4 Term Re. 182, shew that the effects of merchants in foreign countries, are subject to the bankrupt laws of the country where they emigrated ; the former of them went upon the ground of the possession being gained by the creditor, the latter upon the attachers being subject to the operation of the bankrupt laws and bound by them, and yet endeavoring to elude them to the prejudice of his fellow creditors, who were also bound ; had he been a foreigner, he would not have been liable to that action.

*E contra.* It was argued that the assignees of a bankrupt were the owners and proprietors of the effects of the bankrupt in whatever part of the world the same might be ; The goods of a subject, though moved for the purpose of trade into a foreign country, are there subject to the laws of the merchant's country, not to the laws of the country where they are ; They cited Vattel, 270. H. Bl. Re. 665.

*Curia advisari.*—At another day, the court asked the counsel whether it would be satisfactory to them if the court would decide that the plaintiff's debt was payable out of the debts not yet collected, saying nothing of the goods and debts received ; the counsel on both sides answered in the affirmative, and said the garnishee had lent money to the plaintiff to the amount of the debt demanded, to be applied to the discharge thereof, should the court be of opinion he ought to recover upon any of the facts disclosed in the garnishment, or to be returned in case of a contrary decision.

*Per curiam.* We are prepared to say the plaintiff is entitled to recover out of the debts not yet collected : the bankrupt laws in Scotland cannot affect any goods, estate or debts due to the Bankrupt here :—And here we must rest our opinion for the present, chusing purposely to avoid any opinion relative to the effects and debts received by the agent of the sequestrators.

E

Judgment for the plaintiff.

*Anonymous.*

THE bill stated, that the plaintiff's testator borrowed of the defendant a sum of money, and gave an absolute bill of sale for several negroes to the defendant, who engaged verbally to return the negroes on the re-payment of the money borrowed, with interest; the answer admitted the advancement of the money, and stated the bill of sale to be absolute, and the negroes to have been purchased; and that he had promised the plaintiff's testator, that if within twelve months or two years afterwards, he would repay the money, that he the defendant would re-deliver the negroes; but if he failed to pay principal and interest on the first day prefixed, he should not redeem on the second day prefixed, but by another sum in addition to the principal; and that if he failed at both days, the purchase was to be no longer subject to any redemption.

*Williams and Haywood, Judges.* An absolute conveyance upon the face of it, but subject by a verbal agreement to redemption on re-payment of money, is in Equity a mortgage, notwithstanding it be added to the verbal agreement that the conveyance shall be absolute in case of failure on the very day, or to pay with his own money, or the like; or in case of failure to comply with any other condition added to render the right of redemption more difficult or doubtful; the answer confesses enough for us to say it is a mortgage—but as the defendant's counsel insists upon having the contents proved as the mortgage is lost, we will hear such proof.—Proofs were examined and established it to be a mortgage, and the court decreed a redemption.

*Anonymous.*

THIS was a *scire facias* to revive a judgment obtained some years ago, and the plaintiff claimed interest.

*Per curiam.*—A plaintiff is entitled to interest upon his judgment, if he institutes a new action upon the judgment; but if he brings a *scire facias* to revive, he can only have execution upon the old judgment without interest.

*Cutlar vs. Potts and another.*

POTTS, as agent to the defendant had rented a house in Wilmington to the complainant, who enjoyed it about nine months and the house was burnt down. Potts sued upon the note he had taken at the time of making the contract, and recovered the whole rent; and Cutlar filed this bill for an injunction, and to be relieved as to the rent for the one fourth of the year, being the time elapsed after the premises were burnt, and during which he had no enjoyment: The answer stated that the houses were let at a great undervalue, and the note taken to se-

sure the lessor at all events of the rent therein contained and to place it beyond the power of accident.

*Taylor* for the defendant.—If the premises be burnt down before the year expires, the rent is still as much payable both in law and equity as if the tenant had the uninterrupted enjoyment of them, and cited 1 term 312 710, 2 Str. 753, 2 L. Ray. 1477, 3 Burr. 1638, All. 27, 1 ch. C. 183, Dyer 33.

*Sampson, & contra*.—The authorities cited go to establish the position, that where a man covenants under seal for payment of the rent, and the premises are burnt down, that he shall not discharge himself from his covenant by pleading that matter, for he has bound himself by covenant absolutely and unconditionally to pay the rent; but lay the covenant out of the case, and those authorities do not say he shall pay rent for premises he has not enjoyed; and the law is otherwise, 4 Ba. Ab. 370, 1 Roll. Ab. 236, no averment can be admitted against a man's own deed to do it away, or explain what appears to be an absolute agreement into a conditional one; that is the ground upon which these authorities proceeded, as is manifest from the reasoning, 3 Bur. 1638, and as there is no covenant under seal in the present case to estop the tenant from saying the rent ought to be apportioned; and as the note has not been negotiated, he contended it was consistent with the rules of law and equity too, that it should be apportioned.

*Huywood*, Judge, was strongly inclined that the rent should be apportioned, but took time till this day to look into the cases, and now at this day he mentioned the cases of *Brown and Quilter*, Amb. 619, and *Stuart & Wright*, 1 term, 708, and said, as there appeared to be so much more equity in those cases than in the others cited on the other side, he was still inclined to follow them, but as it was stated in the answer that the rent contracted for was not above half the real value of the premises, that circumstance should have some weight, and he would therefore continue the injunction for the present, and put the party to reply and take depositions that the whole matter might once more come fully before the court at another term.

*Adjournatur.*

Newbern, March, 1798.

*Irving vs. Irving.*

**D**EBT upon a bond executed in Maryland, which had two attesting witnesses, one of them was dead, the other alive but residing in Maryland, and his deposition had not been taken.

*Badger*, for the plaintiff proved the hand writing of the obligor and claimed a verdict; he said there was no need of proving the hand writing of the witness as he resided out of the state; his personal attendance cannot be compelled by any process of this court; and it has been decided that the bond being a part of the

Record should not be carried out of the state lest it might be lost.

*Martin, e contra.*—The court decided not long ago that the hand writing of a merchant's clerk who was out of the state, should not be received as proof of the account, though the hand writing were proved, but that his deposition should be taken. There is no difference in reason between proving the hand writing of a witness to an account and to a bond; if one must be proven by deposition, the other ought also.

*Per curiam.*—Proof of the hand writing of a merchant's clerk while he is alive, is not admissible; because of the great opening to fraud that it would make. A merchant might charge to any man in his books the delivery of articles to any amount, and cause the entries to be made by a clerk about to remove to another state beyond the reach of process from our courts, and after his removal recover upon proof of his hand writing. In the case of an instrumentary witness, his name appearing in his own hand writing, is some evidence that he was required to attest for the purpose of proving it in case of a dispute; and when this evidence is corroborated by proof also of the obligor's hand writing, it amounts to strong proof of the bond: here there is not so much reason for caution as in the other case—a deposition is not required, because it might be very expensive and troublesome to obtain it, and the obligor's hand writing ousts the probability of a contrivance between the obligee and witness, but proof of the witness's hand writing is required, because if not made, the plaintiff would not give the best evidence in his power; and thereby raises a suspicion that the witness did not attest.—Where there is no attesting witness the hand writing of the obligor might under some circumstances be proof enough, but that case is not liable to the objection of the plaintiff not making all the proof in his power.

*Badger* then proved the defendants admission of the bond, and praying an injunction against this action by producing the bill in equity that he had filed, and the plaintiff had a verdict.

#### *M. Kinlay vs. Blackledge.*

**C**ASE upon a promisory note to pay at the expiration of seven years from the date, without interest; the seven years elapsed more than two years ago.

*Baker*, for the defendant, contended that the plaintiff ought not to recover interest nor be allowed damages for it, the party having expressly provided that he should not be liable to interest.

*Per curiam.* Haywood and Stone, Judges.—This contract was made upon an expectation that it would be performed at the expiration of the seven years, and the words "without interest," are applicable to the seven years; they cannot be supposed to extend to the case of a delay of payment after that time; interest is allowable for the delay of payment after that time.

There was a verdict accordingly.



*Moody vs. John Goor Pender.*

**T**HIS was an action for a malicious prosecution, not guilty pleaded; and the cause came on now to be tried; to prove probable cause, the defendant's counsel offered what the defendant had sworn on the trial of the indictment, which was for a felony; it was objected to, on the ground that this would be to make a man a witness in his own cause.

*Per curiam.*—Frequently an offence is committed which no one knows of but the prosecutor: what the accused has done may not amount completely to the crime charged against him, but yet affords good ground for a prosecution. If a man prosecutes under these circumstances, and the party indicted be acquitted and sue the prosecutor for a malicious prosecution, and what the defendant swore on the trial cannot be given in evidence for him, no one who was the only witness of the offence, would dare to prosecute for the public—prosecutions would be discouraged and many offenders escape punishment. Had any other witness sworn to the same facts and circumstances, it might be improper to admit this testimony; but as there is no other, the evidence should be received. It was received and the trial proceeded.

It appeared in evidence, that Moody had undertaken to build an house for the defendant, who procured some tools for the purpose, which Moody worked with; they disagreed, and Moody went off to work for another man who lived in the neighborhood. Pender locked up the tools in a chest in a house at some distance from his dwelling-house;—Moody came there in the evening when Pender was absent, broke open the chest, and carried away the tools; he called with them at the house of the defendant's brother and staid there all night, and next day carried the tools with him to the place where he was building for the other person before-mentioned, who lived about five miles from Pender.—A few days afterwards, there was a meeting at Pender's, at which Moody was, and there Pender told him if he did not bring back the tools, he would make him pay for them; to which Moody replied, "Well, I can bring them back;" and soon afterwards did bring them back. At the next term of the county court, Pender stated to the county solicitor, that Moody had come to his plantation in a clandestine manner, broken the chest and carried the tools away, and afterwards returned them, upon being threatened by him; and said if these facts could support an indictment for petty larceny, he would prosecute: the county solicitor thought such an indictment might be supported upon those facts, and a bill was preferred to the grand jury for petit larceny which they found; Moody was arrested, tried and acquitted; a long argument now took place respecting the law arising upon the several parts of this evidence.

*Per curiam.*—To support this action, the indictment for felo-

ny must have been prosecuted without probable cause maliciously, and the plaintiff must have been acquitted. The record of the county court proves that he was indicted by the defendant, tried and lawfully acquitted; the facts might have warranted an indictment for a trespass.

There was no probable cause for an indictment for felony: the defendant did not view it as a felony himself; he threatened to make Moody pay for the tools unless he brought them back. As to the malice, the jury will judge from the evidence, whether the indictment was preferred to answer the purposes of revenge or ill will against him; the only part of the evidence applicable to this point, is the general quarrel which took place between them.

Verdict for the plaintiff, damages £. 65, and he had judgment.

*Blackledge vs. Simpson.*

THE bill stated several settlements of account at different periods, between the complainant and defendant, and balances struck, for which the complainant had given bonds and mortgages; and that in each settlement there were many errors and unfair items, particularizing them, and that Simpson had obtained judgments, and prayed that the accounts might be opened and the errors rectified.—Simpson pleaded the account stated, and that there were not any such errors as the complainant alleged. The matters in dispute were referred to arbitrators, who awarded, that the first settlements were final, and as to the last settlement, that the balance justly due from Blackledge was so much, which was a much smaller sum than had been struck by the parties, and this sum they awarded Blackledge to pay. Blackledge then filed exceptions to the award—the first of which was, that the arbitrators had not given any award with respect to the errors complained of in the bill—the second was, that the arbitrators did refuse to receive any evidence of the errors alleged in the bill—the third was, that the award was not mutual.

*Per curiam.* There are two modes of excepting to awards; one for what appears on the face of the award itself, as that it does not come up to the requisites of the law for constituting a good award; the second is for matter extraneous, as for misbehaviour of the arbitrators. The first and the third of these objections are of the first sort, the second of the latter sort.—The first objection amounts to this, that the arbitrators have not passed upon all that was particularly referred to them, and if this appear upon the face of the award, it is not a good one: they have awarded that the first settlements were final—this is equivalent to saying that the settlements ought not to be disturbed or opened, and this they could not determine without examining into the errors complained of, to see whether in reality there

were any errors or not ; it was not necessary they should state each complaint of error and say it was ill founded ; they have stated enough to shew they have considered these complaints and over-ruled them, and that is enough. As to the third exception, to be sure the rule is, that an award must be mutual, but the meaning of that is, that the award must be so constructed as not to leave him, who is to pay, liable to be sued for the same cause for which he is awarded to pay : but here it sufficiently appears by looking into the bill, pleadings, reference and award, for what cause they order this sum to be paid, and then it follows that if he should be againsued for the same cause, he may produce these proceedings, and shew he has already discharged himself of these demands : It is not necessary they should have awarded any thing to be paid or done by Simpson ; the Coblers award reported by Burrow was held good ; it awarded a sum to be paid for the first breach of the law, and this was upon the principle that the word *for* sufficiently identified the cause which was the consideration of the payment. As to the second objection, that is for the misbehaviour of the arbitrators, and must be made out by proofs : A day was given to make out the proof, and on that day no proof being adduced to substantiate the exception, it was over-ruled, and a decree passed agreeably to the award.

*State vs. Moody.*

**INDICTMENT** for the murder of one Mason, not guilty pleaded ; and upon the trial the Attorney General offered in evidence, the examination of the deceased, taken upon oath and subscribed by him before a Justice of the Peace on the day after he had received the wounds : He died six or seven weeks afterwards. It was offered as the declarations of the deceased.

*Per curiam.*—Declarations of the deceased have sometimes been received, but then they must be the declarations of a dying man, of one so near his end that no hope of life remains, for then the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of an oath ; but if at the time of making the declaration he has reasonable prospects and hope of life, such declarations ought not to be received ; for there is room to apprehend he may be actuated by motives of revenge and an irritated mind, to declare what possibly may not be true.

*Et per Haywood, Judge.*—Though it may not be proper to receive this paper as containing the declarations of the deceased, it may be a question whether it may not be received as an examination taken on oath before a Justice of the Peace, pursuant to the act of Assembly prescribed for such depositions in cases of felony ; when regularly taken pursuant to the act, and the witness afterwards dies, it may be read in evidence ; more especially

if the party to be affected by that testimony were present at the examination, as the prisoner was in the present case.

*Badger*, for the prisoner: I conceive it cannot be read, because the Justice says he believes the deceased was first examined and what he said taken down, and then he was sworn to the truth of the contents; he should have been first sworn to tell the whole truth and then what he said taken down; as he was sworn he might have sworn truly and yet not to all he knew..

*Stane*, Judge.—I cannot think this paper is receivable at any rate; how is it possible a man can be a witness to prove his own death?

*Haywood*, Judge, thinking there might be something in *Badger's* objection, did not insist upon receiving the testimony.

So it was rejected.

#### *Lewis vs Lewis.*

**CASE** upon a note of hand made payable at no certain day nor on demand.

*Per curiam*.—When money is payable on demand, interest accrues not till demanded; when no time is appointed the money is payable immediately, without demand, and interest accrues immediately.

Verdict accordingly.

#### *Hatch vs. Hatch.*

**EJECTMENT.** Upon the trial the case appeared to be—that Lemuel Hatch, the father of the plaintiff and defendant, being seized of the premises in question, devised to the defendant, a tract of land called the Beaver Dam, held by patent of such a date, and he devised to the plaintiff a piece of land purchased of Foy, containing — acres. The land purchased of Foy was comprised of four several tracts, and one of them was a tract which formerly was a part of the Beaver Dam tract, and had been sold by Lemuel and repurchased with the other three tracts, and this was the land now in dispute.

Evidence was allowed to be given to shew what was meant by the Beaver Dam, and that proved that the whole tract formerly was called the Beaver Dam, but that after the part in question had been sold to Foy and before he had reconveyed, the residue had still been called the Beaver Dam tract, and particularly that Lemuel the deviser had made a will in the interval between the sale and re-purchase, in which he called the residue the Beaver Dam tract. The receiving of this evidence was greatly opposed by the counsel on the other side, who insisted upon the well known rule of suffering no evidence to explain or controul what appears upon the face of a deed or will.

But *e contra* it was argued, that there is no ambiguity upon

the face of this will, no man upon reading the will would know that those two clauses could possibly interfere ; that cannot be known until it appears upon evidence that the land in question was formerly a part of the tract called the Beaver dam ; then and not before arises the doubt which is the principal matter of difficulty in this cause—whether under the description of the Beaver Dam tract, he meant to give all the land that was formerly comprised under that description : This doubt is produced by evidence given on the case, not by reading the will, and therefore it should be solved by evidence ; the rule means that no addition shall be made to a will by parol testimony, nor the words of it explained in a different sense from what they naturally import, nor a certain meaning given to that which in itself has no meaning, Bull. N. P. 297, 298 : The evidence now offered does not operate any of these things ; it neither adds to, contracts, nor gives meaning to any clause in the will, it only means to identify that which is described in the will, 5 Re. 68 : and why is the subject matter of a devise described at all, either in a deed or will, but that it may be ascertained by evidence agreeing with the description. Suppose a man gives the plantation whereon I now live, or on lease to A, or that I bought of B, can it be otherwise ascertained what land is meant than by calling evidence to prove that the land in question was or was not that on which the divisor lived or which he bought of B, or was in lease to A ; there are no other means of ascertaining it ; this is all we want in the present case.

*Per curiam*—When the ambiguity does not appear upon the face of the will, but is bred by evidence, it may be done away by evidence ; an averment may ascertain the subject matter of a devise, but not add to the will or take from it, nor in any wise controul its meaning, therefore the evidence offered in the present case is proper ; and it was received. The land in question was re-conveyed to Lemuel by Foy about two months after the making of this will ; he had purchased it before making the will, but did not take a conveyance till after ; but sometime after the conveyence he made a codicil and appointed another executor : Thereupon the defecadant's counsel argued with great earnestness, that this will at the time of its execution, did not convey the lands purchased of Foy to the plaintiff, the divisor not then having them to divise, and as to the codicil, whoever may choose to say the contrary, the books say it is not a republication.

*Harris e contra*.—Any circumstance after the execution of a will which shews the divisors intent that it may be considered as his will, may be taken as a republication, and particularly the making of a codicil, for that amounts to a declaration that upon revising his will he is satisfied with every part thereof except that which is regulated by the codicil ; and he cited 5 Ba. Ab. 615 and the cases there cited and many other books.

*Per curiam.*—The law, is undoubtedly as laid down by Mr. Harris. Any circumstance whatever plainly indicative of his satisfaction with the paper as his will at a particular period, may be taken to be a republication from that time, and particularly a codocil is so considered. The court then stated to the jury the evidence which had been given, and said the question depends upon what is meant by the Beaver Dam; this may perhaps be explained by the words of the will itself.

They are in the one case the tract called the Beaver Dam, held by patent; in the other, a piece of land purchased of Foy. The different modes by which he had acquired these lands seem to have been mentioned by the devisor for the purpose of distinguishing the lands themselves; the residue of the Beaver Dam was never purchased of Foy, and the land purchased of Foy he held immediately by a deed from him, and not under a patent as he held the other; this seems to be decisive; but in addition to this, he always considered and called the residue of the tract, after part was sold to Foy, the Beaver Dam, and devised it in a former will by that name.

There is also another point in this case:—The defendant after the death of Lemuel acted as the plaintiff's guardian, took possession of the land in question as guardian and rented it out from year to year till the plaintiff came of age; this possession will have exactly the same effect, as if another person had been guardian and had done the same acts; and such a possession would have given title to the plaintiff after seven years, if it were accompanied with all other legal requisites; but here the plaintiff had no colour of title to the land in question unless it be included in the devise to him; there is no need to resort to the aid of a seven years possession.

There was a verdict for the plaintiff and a new trial moved for, but the court refused to make a rule.

*Anonymous.*

**T**HIS was an action upon a promissory note, and there was judgment by default, and the jury being now sworn to assess damages.

*Taylor* for the defendant stated to the court that the facts of this cause were, that a race was made between the plaintiff and defendant and the notes of each placed in the hands of a third person to be delivered to the winner; that it was an article of the race, if either of the horses should be disabled so as to be incapable of running on the day appointed for the race, that then the bet should be void and the notes returned to the makers; that the horse of the defendant actually did become disabled on the day of the race, and was adjudged to be so by one of those appointed to determine it, the other being absent; that notwithstanding, the plaintiff ran his horse over the ground and the

stake holder delivered him the note upon which this action was brought; upon the whole of which statement he said it appeared the note was without consideration and that it was delivered to the plaintiff without the defendant's consent and so no contract of his, and that in point of law the defendant might be permitted to give this matter in evidence to the jury, who enquire of the damages upon a judgment by default, not for the purpose of overturning the action, but of mitigating and lessening the damages; the jury have this entirely in their power and ought to hear every kind of evidence that may tend in justice to cause a diminution of the damages—and he moved to be at liberty to give these matters in evidence.

*Per curiam.* Haywood, Judge only in court.—Can you shew any authority to justify the admission of such testimony after a judgment by default?

*Taylor*—I can and will produce it; the subject of a consideration being necessary or not is treated of very copiously in 1 Fonb. 333; all the authorities are there collected and a conclusion drawn from them, that a consideration is necessary, and that without one an action cannot be supported; the defendant may give in evidence that the consideration is illegal, Bull. N. P. 275; and though there be a judgment by default the note must be produced and proved on executing the writ of inquiry, Bull. N. P. 278; and it cannot be proved to be a valid note unless it have a good consideration upon a judgment by default: the plaintiff cannot recover any greater damages than he can prove to the jury sworn to assess them, 2 Barr. 907, 908. This was so laid down by Lord Mansfield in an action upon a policy of insurance where the declaration was for a total loss, and the evidence proved a partial one only, where the question was, whether the plaintiff having declared for a total loss could recover less, or as for a partial one; and I cannot perceive any difference in reason between a default on a promissory note, and one upon an action on a policy of insurance.

*Per curiam.*—The declaration states a note signed by the defendant for such a sum on such a day, and the default admits it; in the case of the policy the damages are totally uncertain till the jury have assessed them; in the case of the note the damages to the amount specified in the note are certain, but capable to be increased by taking the interest into consideration if the jury think proper to allow it, or to be lessened by the proof of payments; but the principal objection which lies against the testimony offered is this, when a default takes place and an enquiry is to be executed as to the damages, every thing material to the support of the action is admitted by the defendant: The quantum of damages is the only thing in question, and the plaintiff comes prepared as to that point only; he has no notice that any of these facts are to be proven, which shew that the note is

not a good one in law, as that it was without consideration, or upon an illegal one, and therefore he must necessarily be taken by surprize, were such evidence suffered to be introduced; if the defendant meant to avail himself of such testimony he should have pleaded the general issue or some other plea which would have given notice to the adverse party that these facts were intended to be proved on the trial. 1 Str. 612. *East India Company vs. Glover.*

The evidence was rejected and the jury assessed damages to the amount of the note and the plaintiff had judgment.

Mr. *Taylor* immediately moved the court for a new trial, but the court refused to make a rule to shew cause why there should not be a new trial unless he could shew a probability that the decision was wrong—Rules are not to be granted unless the court be first satisfied that justice probably requires them.

*Doe, on the demise of John Gray Blount vs. John Horniblea.*

**EJECTMENT** for the one half of a Lot, No. 7, in the town of Washington, and upon not guilty pleaded, the evidence was, that this lot belonged to three men by the names of Bonner, and had been in their family from the year 1747 till the 29th of July, 1790, when they sold it to Hatridge, who was born in Scotland and came to this country in the year 1787 or 1788, and died seized, after the purchase; and that the trustees of the University on the sixth of May, 1795, sold the same to the lessor of the plaintiff as having escheated to and vested in them by the act of 1789, ch. 21, sec. 2. Upon the death of Hatridge, his clerk kept possession for his heirs, who resided in Europe, and that possession has been kept ever since for them, first by one and then by another.

*Taylor* for the defendant, made the following objections to the Plaintiff's recovery;

First—Hatridge, the purchaser, was an alien, and purchased for the benefit of the state; and the title accrued to the state by the alienage of the purchaser, not by escheat; and therefore the University had not any title to convey to the lessor of the plaintiff.

Secondly—admit that the premises escheated upon the death of Hatridge without heirs inheritable, the title did not vest by escheat until an entry made for that purpose by some one authorised by the publick; the Lord's title by escheat is not complete till he has entered on the lands and tenements escheated. 2 Bl. Com. 245. 5 Bl. Com. 173, 179.

Thirdly—If the title was vested in the state without entry, so that they could convey to the University, still the University has no more privileges as a corporation than individuals have as individuals, and so could not convey to the lessor of the plaintiff before entry, a right of entry cannot be conveyed by them.



This is recognized by many decisions of the courts of this country, and is stated as law by all the books that treat of the subjects.

*Harris* for the plaintiff.—*Hatridge* continued in possession till he died; the state did not in all that time disturb his possession, and therefore the presumption is that he was a citizen; he might have become so by taking and subscribing the oath of allegiance according to the laws of the country.

As to the second objection, the King in England, who is the representative of the public, may grant and obtain choses in action; the public here may do the same—the state in this respect succeeds to all the privileges of the crown. Such a principle was allowed for the public good, and is equally necessary here as in England, and now as it was before the change of government. 4 Ba. Ab. 214. 1 P. W. 252.

As to the third objection, the rule that choses in action cannot be transferred, was of use when first adopted; but by a gradual change of circumstances, it has been long deemed even in England, to be a very inconvenient and useless rule; and it may be well doubted whether it is proper to be received here in its full extent: it is certainly a mere nominal rule at this day, for the vendee may still use the name of the vender and recover: he cited *Swift's Com.* 300. 4 Term, 340.

But if the rule has been received here and confirmed by judicial determinations which I do not remember, it does not apply to the present case; for our act of Assembly, 1715, ch. 38, sec. 5, provides that all conveyances of land done and executed according to the directions of that act, shall be valid, and pass estates in land or right to other estate without livery of seizin, &c. So that since this act, where the party cannot make livery of seizin, because he has not the seizin, his conveyance is as good as before the act it could have been, where he was in possession and did not make livery of seizin; and therefore since the act, the grantor need not make any entry, that being dispensed with by the act.

*Per curiam.* Haywood and Stone, Judges.—When an alien purchases lands in fee, those lands vest in him, and the state is entitled to have them divested out of him if they think proper to exert their right, by causing an office to be taken finding his alienage; but until such office be found, the title continues in him; and as he resides in the country and upon land purchased here, he is legally deemed to be a citizen as to this purpose, 'till the contrary be found, *Page's case*, 5 Re. 52, third resolution, also *Cro. El.* 123, abridged in 1 Ba. Ab. 81. It is better the law should be so than that it should require the party to shew his citizenship, whenever the question incidentally arises before the court, when perhaps it is not foreseen nor expected; for if an office be found upon the very point, he cannot be taken un-

awares; he has notice of the question; he may traverse the fact and satisfy it upon issue joined. Hatridge therefore died in possession, and no office finding his alienage ever been taken, he is to be deemed a citizen: as he died any heirs in this country, or elsewhere inheritable to it is an estate that accrues to the public for want of and may properly enough be called an estate escheated. Whether it vested or not in the public without entry, may be decided either upon the law produced and relied upon by the defendant's counsel, or by considering it independent of that law, as land without any owner to inherit it but such as are aliens. If the Lord is entitled by entry, it is vested in the state without entry; for wherever a private person is entitled upon entering, the public is entitled without entering, 4 Re. 58. Or if it be considered as land left without any owners who can succeed as heirs, but such as are aliens, then also the law casts it upon the public, because the freehold cannot be in abeyance; it must vest somewhere, and in the alien heirs it cannot vest, and therefore by operation of law must be vested in the public without any act to be done by them. 1 Ba. Ab. 82, who cites Co. Litt. 2, Leon. pt. 61. The title then of the premises in question upon the facts proven in the cause was in the public, and by the act of 1779, was transferred to the University. As to the question whether they could convey to the lessor of the plaintiff, the general rule is, that a right of entry or of action, cannot be conveyed—we do not know that the force of it is weakened where applied to the case of a corporation. The cases relied on by the plaintiff's counsel, admit the existence of the rule, though they question the propriety of it at this day: It has been recognised by many determinations in the courts of this country, and these too of very modern date; however, as this is a question that very much concerns the University, and those who now are or hereafter may become claimants under them, it had better be reserved for a little more consideration; this may be effected by a verdict for the plaintiff, subject to the opinion of the court upon this point, whether a conveyance by the University to the lessor of the plaintiff, is valid under the circumstances of its having been made when there was a possession in a third person claiming adversely to the University.

The verdict was for the plaintiff accordingly, subject to the opinion of the court upon that question.

*Henry vs. Heritage.*

**CERTIORARI** to remove proceedings below, on a *caviat* between the parties, and the affidavit stated sufficient reason for ordering a new trial, which was not contradicted by opposite affidavits.

*Per curiam*—Let there be a new trial, but it cannot be <sup>she was</sup> court as urged by the defendant's counsel ; that has been <sup>own-</sup> decided, and upon this ground—the act of 1777, ch. 1, sec. 6, <sup>be</sup> and 1779, ch. 4, sec. 1, both taken together, shew it to have been the intent of the legislature that these trials should be in the county where the premises lie, either upon the premises or at the bar of the county court, and not out of the county ; and for this reason they could not permit an appeal to the superior court ; this court now interferes by virtue of its general superintending power in order to prevent injustice or a defect of justice ; but it will interfere no further than absolutely necessary ; for these ends the verdict will be set aside and new trial allowed ; but that must be where the legislature has directed at the bar of the county court or on the premises.

*The University vs. Horniblea.*

**EJECTMENT** for the same premises as demanded in the action, Blount *vs.* the same defendant *ante*, and the same evidence as in that case, upon which the doubt was, whether as the University being out of possession, conveyed to Blount by deed of bargain and sale, they could recover in the face of that deed, or whether they were not estopped thereby to say they yet had title ; and verdict was taken for the lessors of the plaintiff, subject to that doubt to be decided by the court.

*et adjournatur.*

**NOTE.**—*Vide* 2 L. R. 853. 1 Ba. Ab. 157. 3 Lev. 312. 1 Rc. 136. The lease, assignment, &c. is deemed void even between the parties, there being nothing that could by law be conveyed in the last, if there is no person seized no use can arise, and consequently a bargain and sale which operates by raising an use out of the estate the bargainee is seized of, cannot be good for want of the use where the bargainer is not seized and passes nothing ; and so the interest the University had by conveyance from the state, remains still in them, notwithstanding their deed to Blount : as to the estoppel, that can only take place between parties and privies, and here the defendant is neither. Co. Litt. 352.

*Simpson vs. Nadiou.*

**TROVER** for a ship and cargo ; and not guilty pleaded. And upon the trial, it appeared this vessel sailed from Washington in this state, and arrived at a British port in the West-Indies, and was taken by a sloop of war called the *Bellona* privateer, captain Pettetur, commander, as she was going from that port to another English port, having left her papers at the first mentioned port. It appeared the *Bellona* was fitted out at Baltimore, but that the commission was not endorsed which Pettetur

away at the time of the capture; that the plaintiff's vessel was taken into St. Jago, and was sold to a Mr. Osbern, who, it was alleged, but not proved, had authority from Simpson to purchase for him. Nadiou at first owned the Bellona, but sold out six or seven shares; whether before or after the capture, did not appear. Simpson is a Scotchman by birth, but had taken the oath of allegiance in this state before the capture.—Nadiou is deemed by his acquaintance, and is generally said to be a Frenchman; it did not appear he has ever taken the oath of allegiance.

Mr. *Jocelyn* for the defendant.—This is the proper time to move to the court an objection we have to make. This being an action of trover, in which it is simply stated, that this vessel was converted unlawfully to the use of the defendant; we could not plead in abatement, that this court have not any jurisdiction over such a cause, neither could we state to the court its want of jurisdiction, until from the evidence it had appeared to depend upon the question of prize or no prize, or to be for a transaction that happened originally upon the high sea—but that now appearing upon evidence, I have to contend that this court cannot take cognizance of this transaction, being a taking of the plaintiff's vessel upon the high sea, under circumstances which raise the question, whether it were legally taken or not; or in other words, whether it be prize or not. This court cannot decide whether the vessel or cargo were unlawfully converted or not, unless they previously determine whether it were legally taken or not; and that will necessarily lead them into an examination of all these facts which are only examinable in a court of admiralty; he cited 1 Ba. Ab. 624, 625. This capture was either a legal one, or it was a piratical taking; if a legal one, that is to say, taken under a legal commission, it belongs to the admiralty jurisdiction; if taken piratically, it is of admiralty jurisdiction also. 1 Ba. Ab. 625. March. 110. Cro. El. 685. Lev. 243. Ray. 473. Carth. 475, 476. 2 L. R. 893, 936. Ray. 473. Mollay 10, 41. 1 Sid. 320. 2 Keeble 158, 176. Ray. 473. 1 Lev. 243. 1 Sid. 367. 2 Keeble 360, 364. 1 Vent. 173, 308. 2 Keeble, 828. 2 Lev. 25. 2 Saund. 259. Mollay 107, 109. Doug. 594 to 613, 620, 649, 650. 3 Bl. Com. 108. 2 Show. 232. Comb. 474. 3 Bl. Com. 69. He cited many other authorities, and also a case decided in the last circuit court, where, in the progress of the trial, it appearing upon evidence that the cause belonged to the admiralty jurisdiction, the court discharged the jury and dismissed the cause.

*Budger, e contra*.—The court will not arrest the cause at this stage of the proceedings, we do not admit the facts relied on by Mr. *Jocelyn*—we say the Bellona had no commission; Simpson is a citizen of this country; there is no war between us and France; we do not admit the Bellona was a vessel of war be-

longing to the French nation or to any of its citizens; she was fitted out at Baltimore; nor do we admit that Nadiou, the owner, was a citizen of the French republic. These are facts to be determined by the jury.

If the *Bellona* had not a legal commission, as we contend she had not, we ought to recover: there has been no condemnation of the vessel and cargo, and until condemnation takes place, the property is not altered. A court of admiralty acts *in rem*, and the French courts never had and never can have an opportunity as this case is circumstanced, of deciding the question, whether the plaintiff's was a prize; she will never again be within their power. This vessel was not ransomed; she was purchased by a stranger; there is therefore no admission on the part of Simpson of her having been lawfully taken—the matter now insisted upon ought to have been stated in a plea in abatement; when the want of jurisdiction of it really exists and is not taken advantage of by plea at the proper time, it cannot afterwards be insisted upon.

*Haywood, Judge.*—This case is entirely new to me; I have not been apprized of its coming on or of the question to be agitated—I can now only form a hasty judgment upon principles that suddenly occur to my mind. Many of the cases cited are of takings by one British subject of another, the grounds of which are perhaps distinguishable from the present case; before we can determine this cause we must necessarily decide whether the plaintiff's vessel and cargo were legally or illegally taken; for if legally taken it is not true as the declaration states that she was unjustly converted to the defendant's use—this is to say in plain words whether she was a prize or not—that is a question determinable by the *jus belli*, and ought to be decided by some court (if at all to be decided by the courts of this country) whose peculiar business it is to decide questions arising upon the law of nations.—If we can decide this question in this cause, then all our state courts may decide as many such causes as may be brought, that is to say, as often as a French citizen who owned any part of a capturing vessel, or any of the sailors or officers on board can be found in this country and arrested. If we decide one of these causes, we must go on and decide all that can be brought before us. We sit here only to decide causes according to the municipal law of this county; not such causes, the decision of which may become the subjects of national complaint, and may lead to national irritation and war. If such questions are to be discussed and decided in any of the courts of this country, they ought to be courts constituted by the sovereign power, and charged by them with the decision of such questions: For the sovereign power of this country, I mean that power which can constitutionally decide upon war with foreign nations, is responsible to them for any unjust decisions that shall take place—they therefore should have the constitution of courts that are to decide

upon questions affecting other nations; to prescribe rules to them for their conduct and to suspend their functions when policy dictates that measure; for it may frequently happen, that when a citizen is really injured, as Mr. Simpson supposes himself to be, that the sovereign power may not deem it expedient to redress him by attaching, imprisoning, or seizing, and selling the effects of the foreigner who did him the injury; they may chuse to dissemble and overlook the injury done to their citizen, and protect him by paying the money out of their own treasury; they may complain to the nation of the offender, and endeavor to procure redress that way; they may negotiate for putting a stop to such injuries for the future, and for compensation, and take many other steps rather than proceed to the measure which it is now proposed this court shall adopt. This court derives its powers from the legislature of North-Carolina: Suppose it shall proceed to the decision of this question, and that should be upon principles repugnant to and not warranted by the *jus belli*, or the law of nations, and a complaint shall thereupon be made to the sovereign power of this country; will it do for them to say that decision was made by a court of North Carolina, over which we have no controul? We may; and having established a precedent, must do the same thing over and over again—continually repeat injustice, till it will be no longer borne. Every state court in each of the United States may do the same thing; and the sovereign power who is responsible for their misdoings, cannot controul nor suspend them, however dangerous, improper and impolitic they may judge such proceedings to be. If we proceed to decide this question, there is many chances to one that we decide improperly. Have we the means of issuing the process, to give notice to all parties concerned to interpose their claims and bring forward their proofs? —Of giving time, issuing monitions, taking stipulations, and doing all those acts for obtaining the proper materials to form a sound judgment upon, that a court of admiralty or of prize have? And suppose all the materials collected, are we sufficiently versed in the law of nations, and sufficiently armed with powers to expound them, and the treaties subsisting between the United States and different nations, to decide the question? Whenever a war breaks out in England, and questions upon the law of nations are like to arise, particularly with respect to captures upon the high seas, that are to be determined by the *jus belli*, they do not entrust those questions with their common law courts, who proceed according to the municipal law; nor even to their courts of admiralty, who proceed partly by the civil law and other laws peculiar to themselves; but they appoint a court of prize, who frame their decisions upon the *jus belli* and the law of nations.—I suppose a similar practice prevails amongst other nations. I do not therefore believe, that

even the court of admiralty, much less a court of common law, can decide the question now before us: I rather think it is not determinable any where but in a court of prize of the French Republic. Will they permit any other nation to say whether rights supposed to be acquired by their citizens acting under commissions given by them, pursuant to the directions and the laws of the Republic, shall be decided upon by the courts of another nation? Whether they will or not, such a right may perhaps be conceded by treaty; but I rather think it cannot be exercised without consent. If the Swedish courts for instance, or Danish courts, who, on account of their near situation, must have frequent opportunities, should undertake in all such cases to decide, would it not be a just ground of quarrel? if they should decide improperly repeatedly. Might not the French nation say, who made you the arbiter of our rights? By what authority do you take away property which our laws vest in our citizens? Is any nation bound to suffer such an interference? It is asked, what remedy have we as neutrals, if we are unjustly treated and deprived of our property by French laws and French courts, if the French nation make prize of our vessels pursuant to regulations not warranted by that general law which regulates the intercourse between nation and nation, or if their laws be agreeable to this general law? But their captures and condemnations are not warranted by it.—Our citizen is entitled to redress, and our government is bound to procure it for him—but how?—By the decisions of this court? No: the sovereign power of the country will procure it by means, which in their judgment shall be the most expedient, considering our circumstances. If we now say that Nadiou shall refund the value of the ship and cargo; if he does not he must be imprisoned; or if he has any effects here, they will be seized and sold; is not this something like reprisals? We have no power to grant them; all the difference is, we do not authorise re-capture wherever the goods of a French citizen may be found; but it is exactly the same thing as to say, that if any French citizen who has ever been concerned in sharing a capture, comes within the limits of this state, he shall be imprisoned until he makes restitution. The counsel for Simpson, says this cannot be a question to be decided by the *jus belli*, for there is no war between France and us, but there is a war between France and England; and whether we transgress the limits allowed to neutrals, the *jus belli* in any particular case must decide. If we carry contraband goods; if we refuse to be searched; if we sail without papers; I understand a neutral may be taken—and so in many other cases: And in a case of this nature, who is to decide? Will the injured nation not decide for itself? Upon the whole, whether prize or not, it is clear, is a question solely and exclusively appropriated to a court of admiralty or prize court; and a

court of common law cannot decide it: This is clear, and it matters not whether there has been a condemnation, for the omission of that circumstance cannot alter the nature of the question: It remains the same, and is not of common law cognizance; and therefore, I am of opinion, we cannot determine the question before us.—However, I am not conversant with matters of this kind. I never determined, nor was concerned in a case of the like nature before; and therefore I am willing to have the point reserved for further consideration. If I must say whether upon the facts found, this were a conversion or not, I should be inclined to say, as the ship was taken without papers, she was a prize—but I cannot think I have a right to give an opinion judicially upon the question. It is said, it is not fully proved that the *Bellona* belonged to the French nation, nor that she had a commission; enough appears to render it very probable she had, and therefore we cannot proceed without a very great risk of intermeddling in a business we ought not to concern in.

*Judge Stone.*—The reason why trespass would not lie in the case of *Le Caux vs. Eden* was because it would be prejudicial to the British navy—it was a dispute between two subjects of the same power, and the municipal law of that country might regulate disputes between their own subjects as best suited their policy: This is a case of a different kind, where the same reasons against the action will not hold; no public inconvenience can arise from sustaining this action. I am not so well advised as to say we have not a right to decide it; this court is to give redress in all cases of injury to every citizen when he who committed the injury is within the power of the court; and it is immaterial by whom it is committed, whether by a Frenchman, Englishman or any other.—I think the cause had better proceed; the law may be reserved for further consideration. The cause then proceeded, and a question was made, whether as Simpson was born under the allegiance of the King of Great-Britain, tho' he had become a citizen of this country, the capture was lawful.

*Judge Haywood.*—Upon this point I suppose we should determine as a French court would have a right to determine.—The English would say he could not put off his allegiance, and would consider him a subject; I suppose the same maxim would be adopted by the French government upon the question of prize or no prize.

*Judge Stone.*—He is our citizen and that is enough for us to consider.

The cause proceeded and the jury found a verdict for the plaintiff, and assessed damages; and a question is to be further considered upon a motion for a new trial.

*Vide* Doug. 600, 606, 609, 610, 612, 613, 572, 594. 3 Term 323. Carth. 398. 12 Mo. 134. Carth. 474. 4 Term 394, 395. 3 Term 341, 344. 3 Bl. Com. 69, 70. H. Bl. Re. 174, 176. Constitution, article 3, sec. 2.



*Burnes, Executor of Kay vs. Kelly.*

**T**HE plaintiff's counsel produced an account, and proved t'at it had been presented to Kelly, who said, "It is just, but I paid it by a man in Petersburg, and had I time I could prove it." This was before bringing the present action.

The counsel for the plaintiff insisted, that though the rule in general was, that a confession is to be taken altogether, yet that part which goes in discharge, if it be a distinct fact in avoidance, ought to be proved; and here the payment is a distinct fact; and cited Bull. N. P. 58.

The counsel *contra*, argued that the true meaning of the rule was, that the confession should be taken altogether, unless where the matter in discharge was attended with circumstances which rendered it improbable, or not to be believed, or could be disproved; and he cited a case from Dallas.

*Per curiam*.—The rule is, that a confession shall be taken altogether; but if there are circumstances mentioned in the confession, which when examined into, disprove the matter alleged in discharge, or where that matter can be disproved, the jury are to reject it, and go upon the other part of the confession only; as where he says the account is just, but I paid it before such persons, and they know nothing of the payment; or at such a time and place, and it be proved that at that time he was not at that place, but at another far distant; or if he says the account is just, but I will prove it paid, if I have time, and he is allowed that time, and called upon to make that proof, and does not: In such and the like cases the matter in discharge will be rejected.

There was a verdict and judgment for the plaintiff.

*Pons's executors vs. Kelly.*

**T**HIS was an action to recover a sum of money, due as a balance for the sale of a house in Halifax. The declaration also stated another count, for a sum of money contained in a note of hand for the same amount as that balance was of, which Kelly had endorsed to Pons upon one Cox of Edenton, which Pons could not procure payment of from Cox. The house was sold in April, 1793, and for the balance remaining unpaid, which was four hundred and fourteen and an half dollars, the note was endorsed. In about three weeks afterwards, Pons, by his agent, Mr. Porrie, applied to Cox for payment, who informed him he was not able to pay it. In the fall of that year, Porrie, who before that time had returned the note to Pons, accidentally saw Kelly and told him he had applied to Cox for payment in behalf of Pons, and that Cox said he was unable to pay it; and added, Pons will look to you for the money: Kelly replied, he has made the note his own by keeping it so long. In the fall of 1794, Kel-

ly on his way to Edenton, called at Pons's and enquired for the note, saying he would take it and try to get it passed off to Blanchard. Some time after this the present action was brought.— It was however further proven, that Cox was insolvent when the note was endorsed, and when Porrie applied for payment.

The jury found a verdict for the plaintiff, and a new trial being moved for, and a rule to shew cause given,

*Baker* for the plaintiff, on the day appointed for shewing cause, contended—As to the first count for the balance due on the sale of the house, that the plaintiff was entitled to recover on that, for a bill of exchange or promisory note, though endorsed to the creditor, does not go in discharge of a precedent debt unless it be agreed expressly to be so; and he cited Bull. N. P. 186. Salk. 124. Secondly, he insisted that Pons had not made the note his own, for if notice was necessary, that notice had been given by Porrie, and the circumstance of Kelly calling for the note in 1794, is evidence that he had notice. Thirdly, that in the case of a promisory note endorsed, the endorsee was not obliged to give notice: Promisory notes are put upon the same footing as inland bills of exchange, and those need not be protested; the plaintiff, if any loss accrues for want of a protest, shall bear that loss, and if it be to the amount of that bill, it will discharge the defendant, but if no loss happens for want of a protest the plaintiff shall sustain his action, and nothing shall be deducted for want of notice from his demand; and he cited 3 Ba. Ab. 613. Fourthly, he argued that if notice was necessary in general, yet it was not here, for Cox was insolvent and had notice been given to Kelly of non-payment it would not have been of any service to him; he could not have got the money of Cox, and if he has sustained no loss for want of notice, he should not be permitted to urge the want of it as a screen from this action. Fifthly, he argued that if notice were necessary, yet the jury were judges of the time to be allowed in which it was reasonable that notice should be given: The court cannot judge of it, and here they have thought the time elapsed before bringing the action was not too long a time, and surely the commencement of the action was sufficient notice.

*Davie, e contra.* As to the count for the balance, a bill of exchange or negotiable paper endorsed to the creditor is not *instantly* a discharge of a precedent debt; it is not any discharge if the holder or endorsee applies in a reasonable time for payment; and in case of non-payment gives notice thereof to him from whom he received the bill or note, but if he does not do this he makes the paper his own, and the party from whom he received it is discharged. The case cited for the plaintiff says "it is fit to be left to the jury where the party has kept the paper an unreasonable time in his possession," and surely if upon those circumstances the law determines that the holder has made it his

own by his laches ; a jury in such case should say it operates a discharge of the precedent debt ; it would be very unreasonable to say the paper should be his own, and that still he should recover the precedent debt ; as to the notice given by Porrie, it was of no avail ; notice should come from the indorsee, and it should import, not singly that the money is not paid, but also that the holder does not intend to look to the drawee of the bill or maker of the note, but to the endorsers, 1 Term, 160, Kidd 79, 80 ; here Porrie had no directions nor authority from Pons to give notice ; what he relates was mere occasional conversation : The endorsee of a promisory note is equally bound to give notice as the endorsee of a bill of exchange, 1 Burr. 678. The authority cited from Bacon's Abridgment does not prove that the endorsee can maintain an action against the endorser without notice ; it seems to intimate that when notice is omitted to be given, the payee must bear the loss occasioned thereby, and latter determinations shew that the distinction is not a good one ; the want of notice is not excused by the insolvency of Cox : Want of notice can be excused but in one case, and that is where the drawee who will not accept has no effects of the drawer in his hands. If the maker of a note has become insolvent, notice thereof must be given by the endorsee, Kidd 79, 2 Bl. Re. 747 ; this plainly contradicts the idea that insolvency will excuse the not giving of notice. As to the reasonableness of notice and what shall be deemed reasonable time, it must in some measure be left to the jury, but if they allow what is plainly and evidently a longer time than is necessary or reasonable, the court may controul them.

*Per curiam.*—If an indorsee keeps the paper so long in his hands as to make it his own, *ex necessitate*, it must be a discharge of the precedent debt, though not so originally. It would be absurd to say he could keep the note, and also recover for the precedent debt ; the case cited admits it may become so *ex post facto*. It means that a note endorsed is not a discharge of a precedent debt unless agreed to be so, except in the case where the holder keeps it an unreasonable time in his possession, and then it may ; and that this is fit to be left to the jury.—In order therefore, to determine whether the note in question be a discharge or not, we must resort to the indorsement and to the law upon it, and draw conclusions from them. The indorsee of a bill of exchange undertakes in reasonable time to present the bill for acceptance, and then for payment ; and in case of non-acceptance or non-payment, to give notice thereof in reasonable time to the indorser. The indorser can never support an action unless he performs all parts of this undertaking ; he must prove the giving of notice, or in case of the non-acceptance of a bill, prove that there were no effects of the drawer's in the drawee's hands ; that is to say, if he or the payee means to resort to the

drawer : But this proof in excuse of not giving notice, only can apply to the case of a bill of exchange not accepted : for if it be accepted, that is full proof that the drawer has effects in the hands of the drawee, or that he has credit upon him ; but such proof in excuse of want of notice, can never be given in case of a note endorsed, for there the maker has accepted at the time of drawing or making the note, and the indorsee cannot say he had no effects of the drawer in his hands. As to the point, whether notice is necessary in case of a promissory note, every reason which requires it in the case of a bill, holds equally strong in the case of a note. The case of Tindal and Brown is a case upon a note, so was that of Russell and ———, reported by Douglass in the case cited from Kidd. 79. It is expressly stated, that notice in case of a note is necessary to entitle the holder to his action : these cases which state the law to be otherwise, are old cases decided before the law respecting bills and notes had advanced to its present degree of perfection. As to what shall be deemed notice sufficient, the indorser must have notice thereby from the indorsee, that he cannot obtain payment, and that he the indorsee looks to the indorser for payment. The argument that the insolvency of the maker of the note would be an excuse to the indorsee for not giving notice, seemed to be of some weight when first offered, but upon consideration, it has none : The indorsee ought to give notice, for perhaps the indorser may procure payment by the help of friends, or by some means unknown to the indorsee, and not within his power. Kidd. 79, abridging the cases in the books, says, if the maker of the note be insolvent, the indorsee must give notice to the indorser ; the same is laid down in Bl. Re. 747. And Lee, in arguing the case of Russel & Langstaff, said, that Lord Mansfield had non-suited many plaintiffs at *nisi prius* for want of notice, although it were proved that the maker of the note or drawee of the bill was insolvent ; and in the case of Goodall and others *vs.* Dolley, 1 Term, 712, where the drawee and drawer were both insolvent, and the counsel to excuse the want of notice insisted upon that circumstance, it was answered to be perfectly clear, that the law was otherwise ; and that answer prevailed so far both with the counsel and the bench, that the point was instantly abandoned, and no more notice taken of it. With respect to what shall be reasonable, it must be laid down in general, that the party shall give notice as soon as he conveniently may, all circumstances considered, but the court will say what time is reasonable ; and if the jury allow beyond that time, the court will set aside their verdict ; otherwise one jury might think one time reasonable, another another, and so on, *ad infinitum*, so that there would be not the least certainty.

Verdict set aside, and a new trial ordered.

*Freeland, Assignee vs. Edwards.*

**D**EBT upon bond, with a penalty, conditioned to pay without any time mentioned; and the question was, from what time interest was to be calculated.

*Haywood, Justice.*—The rule is fixed, that bonds payable without any certain time mentioned, are payable *instanta*, and bear interest immediately from the delivery.

*Davie.*—I wish we could have the reason upon which these determinations have been founded, that we might examine them and see whether they be good or not. A bond payable on demand, is payable immediately, and may be sued upon immediately, without any previous demand made for that purpose:—The same in the case with a bond payable on no certain day mentioned in the bond. I believe the British determinations have concurred with ours on this subject, but really I can perceive no good reason for the distinction: Our own act directs that bonds payable on demand shall bear interest from the demand; by the same act an account stated and signed, bears interest immediately from the signature.

*Haywood, Justice.*—The reason of the distinction is this; in case of a bond payable without saying when, the obligee has not to do any act either to entitle himself to the action, or to the interest; in case of a bond payable on demand, he undertakes to make a demand, otherwise the words, on demand, have no meaning; and if a demand is to be made it is for some purpose; it is not to entitle himself to the action; therefore it must be to give a right to demand interest. The act of Assembly proceeds upon this very principle; it says a note payable on demand shall bear interest from a demand made. When speaking of an account signed, it says, interest shall accrue from the signature; yet on both instances an action may be brought immediately without any formal demand; but if we could not give the reason of the decision, yet we know the rule is so established; it is therefore far better to make it the standard of our adjudications than to render the law again uncertain by departing from it.

There was a judgment accordingly for interest from the date.

*Kinchin's executors vs. Brickell.*

**D**EBT upon bond which had been brought up into this court by appeal from the county court of Franklin; and now there being a verdict against the defendant,

*Mr. Falconer* for the plaintiff, moved that judgment might be entered up upon the appeal bond against the sureties for the appeal.—And he grounded this motion in 1785, chap. 2, sect. 2, “when any appeal prayed shall not be prosecuted and the court before whom the said appeal may be determined shall affirm the judgment, then shall the appellant be decreed to pay to the ap-

"pellee 12 1-2 per cent. interest from the passing of the judgment in the county court, by which such appeal may have been granted, and the bonds taken for prosecution of appeals with effect shall hereafter make part of the records sent up to the superior court, upon which judgment may be *instantly* entered up against the appellant and his sureties, &c."

*Haywood, Justice.*—A motion of this sort was some time ago made in Salisbury court; Judge Stone and myself being present, and he seemed to be of opinion that the motion ought not to be allowed, I do not recollect that the practice has been settled.

General *Davie*.—Such a motion was lately made at Hillsborough, and failed.

*Haywood, Justice.*—I will take time to consider of it; you may mention your motion a day or two hence.

And now at this day Mr. *Falconer* renewed his motion.

*Haywood, Justice.*—The motion at Salisbury was, as well as I remember, the term after the judgment: I thought the judgment might be entered; Judge *Stone* thought it would be to pass against him unheard; the answer to that was, that the laws having provided the entering up judgment against sureties *instantly*, was a full notice to them that they would be proceeded against, or might be proceeded against, whenever judgment should be obtained against their principal, and then they should be ready to defend themselves; that the bond was a record made up in court, and spoke the truth incontrovertibly, so that its execution could not be denied: The event of this decision was, that notice issued and judgment was entered against the sureties at the next term.

General *Davie*.—Some years ago, at Hillsborough, I made a similar motion with the present, and Judge *Williams* would not allow it, from the same reasons that Judge *Stone* thought it improper, and I was obliged to take out a *sci. fu.* Judge *McCay* at Hillsborough, would not give judgment the other day, because of the opinion of Judge *Williams* and Judge *Stone*, which was then mentioned to him, but said it was the established practice in the western riding to enter up judgment against the sureties as now moved for.

Judge *Haywood*.—The law is express that judgement may be entered up against them, as Mr. *Falconer* proposes.—The objection that the defendant has no notice of this proceeding being intended is well answered, by saying that the act of Assembly gives him notice; the nature of his understanding combined with the law is a sufficient notice to him that he may be thus provided against whenever judgment shall be obtained against the principal. I am well satisfied in this opinion, and as Judge *McCay* is of the same opinion, I shall permit the judgment to be now entered as moved for.

And it was done accordingly.

*M<sup>r</sup> Neil vs. West.*

**D**EBT on a bond, with a penalty, for depreciated money, payable in 1778. The bond was executed in July 1777, and when the scale was applied to it by the jury, the sum really due, with the interest thereupon, was for a less sum than £. 50.—A motion was made to nonsuit the plaintiff before the verdict was entered, but agreed to be subject to the opinion of the court, and a nonsuit to be entered if the court should be of opinion that the motion was proper: And now at this day the motion for a nonsuit being again made and argued by Baker in support of it, and by Davie and Whyte against it.

*Haywood, Justice.*—This act extends to actions of debt, and to assumpsits: The legislature, speaking to the plaintiff, say where the defendant was in the same district with yourself, so that it will not be very inconvenient for you to sue him in his own county, which is near, you shall not harrass him with the expences of a suit in the superior court unless your demand be of importance in point of value, and that standard shall be one hundred pounds; but if he lives in another district, where it would be very inconvenient for you to sue in his own county, your convenience shall be so far consulted, as that you shall be permitted to sue him in the superior court of your own district, provided the value of your demand be fifty pound: And in order to compel you to an observance of this you shall be nonsuited in case you do not prove the necessary sum due upon trial; except where part of the demand cannot be recovered for want of proof or is barred by length of time, though originally just; and this must be shewn by affidavit; in which case, there may be a recovery for what is well proven; if that, together with what is lost, amount to the sum necessary to give jurisdiction to this court. It is intended that the second proviso in the tenth section of 1777, chap. 2, must be considered as excepting some case out of the enacting part of that clause, otherwise it was nugatory and then it would follow, the word "not" should be rejected, and the clause would then signify that suits upon bonds with a penalty should not be subject to go off by nonsuit, although the balance due upon them was of less value than the sum required by the clause in other cases to give jurisdiction to the court. But in the first place I would ask, is there any reason to distinguish the case of a bond with a penalty from a single bill or bond without one, that should induce the legislature to have had the intention attributed to them, and I think there is not: next, this very clause has been re-enacted by a law subsequent to that of 1777, and the word "not" is retained; it was either put in *ex abundanti cautela* to inforce the former part of the act more strongly; or perhaps it was intended as an exception to the first proviso, and meant to say that bonds with a penalty, where the balance was under fifty pounds, should not

be protected from a nonsuit, by the penalty or by such affidavit as was allowed in the other proviso—whatever may have been the meaning of the legislature it certainly could not mean to distinguish bonds with penalties from single bills, for the purpose of making them smaller in the superior court where less was due upon them than the sum necessary to give jurisdiction to the court. It is argued that want of jurisdiction should be taken no advantage of by plea in abatement, and not after a plea in chief, which always admits jurisdiction: This is true at the common law, but in the present case the legislature saw it could not be well done in all cases by plea in abatement, and therefore they altered the order of pleading. Suppose payments have been made on a bond, and not endorsed, which reduce the sum under fifty pounds, or a release or other discharge given for part, and the original sum be sued for and the defendant pleads the sum really due is of less value than fifty pounds; the plaintiff replies, it is of the value of fifty pounds, and the defendant offers payments in evidence; under this issue he cannot be permitted to prove them, and yet the sum really due is under fifty pounds; if he cannot therefore take advantage of want of jurisdiction by some other means than by plea in abatement, he would lose the benefit of this act, and therefore the legislature has directed it to be taken by way of nonsuit; after all the evidence is given and when the jury have pronounced their verdict, and before it is entered, is the proper time to take advantage of the act. A plea in abatement is entered to save expence by preventing a trial when the action in its present form is not legally supportable.—But if all the evidence is to be examined upon a plea in abatement, in order to discover whether the sum sued for is really of the necessary value or not, then a plea in abatement is not at all preferable in point of saving expence, to a plea in chief, and that was one further consideration that operated with the legislature to direct a nonsuit. It is argued that this is a bond for depreciated money which upon the face of it is of sufficient value to give jurisdiction to this court; for the jury were at liberty to value it by applying the scale at the time when the debt was contracted, as well as when it became payable; in the former case it would have been of fifty pounds value and upwards: The answer to this is, the plaintiff knew the circumstances under which the debt was contracted; If these circumstances entitled him to have the money in the bond estimated according to the value of currency when the bond was executed, then it would amount to fifty pounds, and he might safely sue. If the circumstances would not entitle him to have it admitted in that manner, then the money in the bond was of less value; and when the jury have pronounced its value, their verdict if not set aside, is the highest evidence of the value of the money, and proves that the plaintiff has come improperly and against law into this court.



The plaintiff is as much bound to know the value of his depreciated bond, as he is the balance of a bond not depreciated.

It is next argued, that the plaintiff in the present case, resides in Virginia; and that suing here, he might as well sue in the superior as in the county court for a debt of £.50. And if the legislature considered the expence in making the claim in question to determine their intention as to a suit in the county court on such a case as the present, rather than one in the superior court, the trouble of attending is equal and the expence to the defendant, is greater in the latter court, and therefore the action should have been brought in the county court; the answer is, the defendant may be sued to a court out of his district when the debt is of fifty pounds value, to suit the plaintiff's convenience; and he cannot complain if he is sued for that sum in the superior court of his own district, where the plaintiff is obliged to come to that court from a great distance; perhaps it is less troublesome to the defendant to attend there to answer a debt of fifty pounds, than it is to attend to the suit of one of his own citizens out of his district; and the foreigner should in justice have the same advantage as is allowed to citizens—and this can only be attained by allowing him to sue in the superior court for the same sum as he might have sued for had he been a citizen residing in another district; he may have actions of fifty pounds value against persons residing in several counties of the same district; and it would be far more convenient for him to sue them altogether in the superior court where his business might be all attended to at and the same time, than be obliged to almost perpetual attendance on the several county courts at different times and places; and as to the defendant, it subjects him to no more inconvenience than he would be subjected to if the debt belonged to any other person not residing in his district, though a citizen of the state.

I am of opinion, as the jury have found a verdict for a less sum than fifty pounds, that a non-suit ought to be entered.

*Branch vs. Bradley and others.*

**TRESPASS.** *Per curiam.*—The defendants plead a justification under a warrant to arrest the plaintiff's negro; they do not produce the warrant, but prove it by parol. The constable must produce it or he cannot justify under it; the warrant is put in writing, to the end he may produce it when questioned for what he does pursuant to it; and without producing the warrant, he is in the same situation as if none ever existed.—As to such of the defendants as were summoned to aid him in making the arrest, they may justify without producing the warrant; they were bound to assist the officer, and could not first require a sight of his warrant; so whether he had one or not, they were bound to obey: But if after they were summoned

they acted improperly, and did more than was necessary to compel a submission to the arrest, they were trespassers. And if the constable after the arrest, suffered the negro to be beaten by Bradley, he was a trespasser; for the arrest was made for the purpose of carrying him before a magistrate, and not for that of beating him without carrying him before the magistrate.

Verdict and judgment for the plaintiff *vs.* Bradley and the constable.

*State vs. Weaver.*

**I**NDICTMENT for the murder of a negro man named Lewis, the property of Smith, not guilty pleaded; and the trial now came on.

*Et per curiam.* Haywood, Justice only in court. In his charge to the jury.—The nature of the evidence is such as makes it necessary you should have clear ideas respecting the requisites to constitute several denominations of homicide; that is to say, justifiable homicide, manslaughter and murder; for upon this evidence it has been contended for the state that the offence of the prisoner amounts to murder, by the counsel for the prisoner, that it is but manslaughter at most, if not justifiable homicide. So far as the evidence can relate to these offences justifiable homicide may be defined thus: where the person killed, attempts to kill the slayer, and he kills in his own defence, it is justifiable. Manslaughter is where some great provocation is given, that is calculated to excite the resentment of a reasonable man to such a degree as to take away the proper exercise of his reason, he kills the aggressor; as if the aggressor spits in his face, pulls his nose, kicks him, or the like, or where blows pass; in all these cases the blood is heated and the passions roused or excited; and the killing under such circumstances, is attributed to human frailty, and not to a wickedness of heart. Murder is where the homicide with malice aforethought, which means not what is commonly understood, but a doing the act under such circumstances as shews the heart to be exceedingly malignant and cruel, above what is ordinarily found amongst mankind; & the wickedness of heart is collected either from the express words and conduct of the party, or from the manner in which the deed is done.—In the first instance, by threatening expressions, former grounds, or schemes to do him mischief, as by lying in wait for him and the like; in the latter instance, by the excessiveness of punishment or dangerous weapon, or means made use of to punish; as if for a slight offence which deserved only moderate correction, any man should take up his servant and beat him so excessively as to cause his death; if in such a case for such an offence, he should beat out his brains with an axe, shoot him with a gun, or kill him with a sword; from all these circumstances, it is allowed that the heart is exceedingly depraved and cruel, and that the

killing has not proceeded from the frailty of human nature, and therefore the offence is deemed murder. This is the law with respect to a freeman who is killed, but with respect to a slave it is somewhat different; for if a free servant refuses to obey the commands of his master, and the master endeavour to exact obedience by force, and the servant offers to resist by force in such a case, and the master kills, it is not murder, nor even manslaughter, but justifiable; much more is it justifiable if the slave actually uses force and combats with the master.—If therefore you shall be of opinion upon examining the evidence, that the deceased actually attempted to kill the prisoner, who was a temporary master, having hired him for a year, and that the prisoner killed in his own defence, he is justifiable; if you find the deceased actually used force and was resisting by force when he was killed, the prisoner is justifiable; or if he offered to resist by force when he was killed, the prisoner is justifiable. If none of these circumstances are to be found in the case, and you are of opinion that the killing with the pistol was with malice aforethought, as before explained, then the prisoner is guilty of murder.

There was verdict for the prisoner of not guilty.

*State vs. Leban Pugh and four others.*

**T**HIS was an indictment for a riot. Two of the defendants were now tried, and one of them found guilty, with the others named in the indictment, except the other defendant now tried, whom they found not guilty: One of the remaining three not before the court, was dead, another in South-Carolina where he resided, and one in this state, but not taken. The attorney-general moved for judgment.

*Haywood, Justice*.—I have a doubt whether judgment can now pass upon the defendant, who is now convicted.—I will look into the books: Let it be again moved to-morrow.—Accordingly the next day the matter being again moved,

*Haywood, Justice*.—My doubt yesterday was, that as two of the defendants not brought into the court were yet alive, and as it is not impossible but that they may still be brought in and tried and acquitted, it still remained doubtful whether the prisoner now convicted might not be legally innocent; for the acquittal of these two, together with the acquittal of the one which has already taken place, would leave but two to be guilty—and so not a riot. I have looked into 1 Str. 193, the *King vs. Kennersley*; and into 2 Burr. 1264: In one of which cases the objection was stated that arose in my mind, and was there answered by saying that the verdict estopped the party to say he was not guilty; and the court deemed it a sufficient answer.—Upon this authority, I shall proceed to judgment against the defendant now convicted.

He was fined and imprisoned for three months.

*State vs. Wyatt.*

**INDICTMENT** for perjury in swearing to his attendance as a witness in the county court of Martin, before a justice of the peace, and charging for eight days attendance, whereas he had not attended eight days, &c.

*Per curiam.* Haywood, Justice, only present.—The prosecutor may be a witness, though he be the person who is liable to pay for the attendance; for a verdict and conviction in this prosecution cannot be given in evidence to prove it; the evidence ticket being taxed in the execution, is a recovery in the form prescribed by law; but it is alledged on the part of the defendant, that the justice was not empowered by any law to take probate of this evidence ticket; the indictment fails at once, and is useless to proceed any further in the trial. This indictment concludes against the act of Assembly, and this subjects to the punishment of perjury only, where the oath is taken before some officer authorised to take it pursuant to the laws of the state. In order to make it a perjury, the oath must be taken in some judicial proceeding, and before some person empowered to administer that oath that is taken; a mere voluntary oath cannot amount to perjury.

The Attorney-General endeavoured to contravert these practices, and offered some authorities to shew the contrary.—But, *Per curiam*, The doctrine is incontrovertable.—I have no doubt upon the subject.—Not an instance can be shewn to the contrary.—Perhaps the defendant might be indicted for a misdemeanor.—I think I have known some prosecutions of that kind supported.

There was a verdict for the defendant.

*Grant vs. Winborne.*—Ejectment.

**PER curiam.** Haywood and Stone, Justices, present.—The premises in question consist of a small parcel of land comprized in a grant to Skippen, dated in 1725, and also in a grant to the father of the lessor of the plaintiff, dated in 1762; which latter grant lopped over upon the former. It is admitted the former patentee once had title to it; but it is contended that there has been such a possession in the latter patentee and those claiming under him, as has destroyed that title, and acquired one for the lessor of the plaintiff. As to the nature of the possession that is calculated to have the operation, it is to be collected from a recurrence to the time of passing the act of limitations, and the then circumstances of this country; the act was passed in 1715, when this country was but thinly inhabited, and it was the policy of the legislature to encourage its population. In many

instances, the same land was covered by two or more grants ; and frequently when a latter patentee or those claiming under him, had settled upon the land comprized in his grant, and had cleared and improved it, he was turned out of possession by the exhibition of a prior grant ;—this tended to discourage the making of settlements, and of course repressed population :—The legislature, therefore, provided the act of limitations to obviate these mischiefs ; and it was the intent of the act, that where a man settled upon and improved lands upon supposition that they were his own, and continued in the occupation for seven years, he should not be subject to be turned out of possession : hence arises the necessity for a colour of title ; for if he has no such colour or pretence of title, he cannot suppose the lands are his own, and he settles upon them in his own wrong. The law has fixed the term of seven years both for the benefit of the prior patentee as the settler, that the latter might not be disturbed after that time ; and that in that time the prior patentee might obtain notice of the adverse claim and assert his own right ; hence arises the necessity that the possession should be notorious and public, and in order to make it so, that the adverse claimant should either possess it in person, or by his slaves, servants or tenants ; for feeding of cattle or hogs, or building hog-pens, or cutting wood from off the land, may be done so secretly as that the neighborhood may not take notice of it ; and if they should, such facts do not prove an adverse claim, as all these are but acts of trespass : Whereas, when a settlement is made upon the land, houses erected, lands cleared and cultivated, and the party openly continues in possession, such facts admit of no other construction than this, that the possessor means to claim the land as his own ; in order to make this notorious in the country, he must also continue the possession for seven years—occasional entries upon the land will not serve ; for they may be either not observed, or if observed, may not be considered as the operation of rights ;—and from this view of the subject, arises the following definition of possession which is calculated to give a title :—A possession under colour of title, taken by a man himself, his servants, slaves or tenants, and by him or them continued without interruption for seven years together.

There was a verdict for the plaintiff.

— *Ingles vs. Donaldson.*

**T**ROVER for a Negro named Cæsar ; not guilty, and upon the evidence the case appeared to be thus : That the Negro formerly belonged to Murray, who in the county court of Edgcombe, at November term, in the year 1792, confessed judgment to Garner for the sum of forty pounds or thereabouts, upon which judgment and execution issued, tested 27th November, 1792.— On the first day of December, in the year 1792, another execu-

tion, but of what date did not appear, upon a judgment before a Justice of Peace, at the instance of another plaintiff, was in the hands of Jewell, a constable, who on that day levied on Murray's household furniture; Murray immediately on the same day applied to Donalson to discharge this debt for him, being to the amount of thirteen pounds five shillings; Donalson did discharge it, and took from Murray a bill of sale, dated on that day, purporting to be an absolute bill of sale, and to be in consideration of one hundred and fifty-two pounds: The Negro was sent for and delivered to Donalson, and immediately returned to Murray's service by Donalson's direction; but in a few days afterwards came to Donalson and worked with him; about a week after which he returned again to Murray, and continued in his possession till the time of executing a bill of sale to Ingles, and in that time Murray occasionally hired out the negro as his own. Donalson on two different occasions admitted the bill of sale of him was intended as a security for money, and he now proved that Murray was indebted to him in the two further sums of forty pounds and twenty-six pounds. On the 31st of January, in the year 1793, Ingles purchased the same negro of Murray paying off Garner's judgment, deducting a debt due to him from Murray, of fifty-four pounds or thereabouts, and assuming other debts which Murray owed, and which he (Ingles) has since discharged, to the amount, in all, of £. 134 13 s. Ingles acknowledged, and it was now proved that he had first notice of the bill of sale to Donalson.—Ingles registered his bill of sale at February term, 1798; Donalson registered his at May term, 1793, and Garner's execution was returned satisfied to February term, 1795. When the bill of sale to Donalson was executed, Jewell, the attesting witness heard Donalson say it was to secure his money, and he heard them talk of no money save only the £. 13 5 0.

Baker, for the defendant, insisted, that as Donalson did not take and continue the possession of the negro, but suffered him to continue in the vender's possession, that it was an evidence of fraud, and of an intention to delay and hinder the other creditors of Murray of their just debts, and was therefore void. Secondly, that the bill of sale to Donalson was in truth but a security for money, and yet purported on the face of it to be an absolute one and was not accompanied nor followed by possession; that it was void, and he cited to the first part, 3 Re. 80, Tryon's case, and to the second, 2 Term 594, and he urged vehemently upon the latter authority, that Donalson's bill of sale being absolute and not consistent with the vender's continuing in possession was absolutely void: And thirdly, he insisted that Ingles having advanced the money to satisfy Garner's execution, which had it not been satisfied would have caused a sale of the negro. Ingles, though he purchased from Murray, was to be considered

in the same light as if he had purchased from the sheriff by a sale under the execution; and he cited Bull N. P. 50. 5. Reports 60.

*Dawie, & contra*, argued in support of the bill of sale to Donaldson.

*Et per Curiam*—Haywood, Justice in the court.—The first thing to be observed upon is the execution upon Garner's judgment; Murray's goods and effects were all bound by that from the time of its date, and he could not after that date sell or dispose thereof so as to defeat the execution. No sale made, pending the execution, unsatisfied, will be good to vest the property in the vendee unless eventually the execution shall become satisfied by some other means. As to what has been said respecting the want of possession, if it be necessary in the present case to resort to that circumstance; the want of possession is a strong badge of fraud: The property is placed in the creditor, the possession continues in the debtor, and by that means other creditors perceiving no visible diminution of the debtor's effects, rest satisfied, and take no measure to secure their debts until perhaps the whole estate of the debtor is exhausted, whereas should the creditor immediately take possession, other creditors would thereby have notice that the debtor's estate was wearing away and apply for the discharge of their demands in time. It has this further ill effect, that the debtor still continuing in possession, and being reputed owner, obtains credit upon a belief that he is the owner, and so by fault of the vendee possesses the means of contracting debts without the means of paying them. But in general, this want of possession is only evidence of fraud, which may be explained and repelled by contrary evidence; it is not absolutely conclusive, but is only a strong sign of fraud, which by circumstances equally strong, tending the other way, may be overturned. In the present case, the bill of sale to Donaldson, purports upon the face of it to be absolute, and to vest the whole property immediately in the vendee; whereas in truth it is but a security for money: This also is a mark of fraud, for it is calculated to mislead and deceive creditors, and to make them believe that no part of the negro or his value is subject to their demand, when in fact it is otherwise: Indeed the case cited at the bar determines that an absolute bill of sale not accompanied with possession is fraudulent and void; though a bill of sale with a condition permitting the possession to remain with the venter is not, because there such possession is consistent with the deed which upon the face of it discovers the truth to creditors, and cannot be said to intend a concealment of circumstances in order to deceive them. This doctrine is supported by a great number of decisions, and is built upon good reason, where creditors are concerned, the transactions of the debtor in relation to the disposition of his property should exhibit their real situation and circumstances

to the world that every one who is interested in them may know with certainty what has been done, and how to act; if they do not, but on the contrary, are so constructed as to conceal circumstances which should be known, and to give a different appearance and coloring to the business than it really ought to bear, the presumption of fraud attaches to them in proportion to such concealment. With respect to the purchase made by Ingles from Murray, it has been urged, that is, between Murray and Donaldson, the property passed out of Murray; though supposing the conveyance fraudulent, it did not as to creditors; and that therefore a sale from Murray afterwards to Ingles could carry no property, however a sale by the sheriff might have done it.—I was at first very forcibly struck with the remark, but the cases cited from Bullers N. P. and from 5. Re. 60, have removed my doubts; these state that a contract which is fraudulent as to creditors, it is fraudulent also as to purchasers; and that the purchaser has notice without registration, his purchase is good; for if he has notice he knows the contract to be a fraudulent one and void.

The jury could not agree, and a juror was withdrawn by consent.

### Wilmington, May Term, 1798.

#### *Cutlar vs. Potts.*

**T**HIS case was again taken up; and *Haywood*, Justice, was of opinion that equity should relieve in cases where the premises are burnt down without the default of the lessee, before the rent day or the expiration of the stipulated time, upon the ground that when the consideration fails in whole or in part, the obligation built thereupon ceases in proportion.

Judge *Stone* thought it politic that the law should be as stated in the law authorities cited on the former argument, otherwise a lessee might frequently be tempted to destroy the premises, in order to get clear of his bargain; the law as laid down in these authorities has the opposite tendency: Lessees have every inducement to take care of the premises, and none to injure them, when they must pay whether the premises are burnt down or not; the value of the rent is a loss that must fall some where, upon the lessee if he pays, upon the lessor if he does not;—and why should that loss fall upon the lessor, who is an innocent man, any more than upon the lessee, who is no better than one innocent man?

#### *Cutlar vs. Quince.*

**T**HIS case was again argued.—Old Quince died; young Quince administered, sold part of the estate, and took the bond in question; he died, and Miss Quince administered as



*administratrix de bonis non*; and the question is, is she a creditor of the obligor and entitled to administration on his estate, by 1715, ch. 48, sec. 8, in preference to Cutlar, who is a creditor but for a smaller demand.

Mr. Hill cited several cases from Com. Digest, to shew that the action for monies due upon the sale of a testator's estate, must be brought as executor; and he also cited 1795, ch. 14, sec. 4, where after directing a sale upon credit and bonds with sureties to be taken, it proceeds thus: "And such executor, &c. or administrator, &c. shall after the time of such payment is past, take and pursue all lawful ways and means to recover and receive the money so due as aforesaid, or otherwise shall be chargeable or answerable for the same; and that such monies when received, shall be liable to the satisfaction of judgments previously obtained, and entered up as judgments when assets should come to the hands of the executor or administrator." And he argued that by this act, most evidently the money due upon such bonds, is considered as belonging to the estate of the testator, and to be assets to charge the executor only when recovered and received; whereas the authorities which say the executor shall sue in his own name, consider the bonds as belonging to the executor himself, who is chargeable for the goods sold, whether he receives the money due upon the bond or not; and supposing the common law to be as contended for on the other side, it is now altered as to this point by the act of 1795, as it substitutes the monies due upon the bond when recovered in the place of the goods sold, and makes him not chargeable as formerly for the goods, but for the product of them when received; and consequently, these bonds being a part of the deceased's estate, and to be sued for in the character of executor or administrator, and not *in jure proprio*, will upon the death of the executor or administrator, go to the administrator *de bonis non* of the first testator or intestate, as a part of his estate, and not to the executor or administrator of the first executor or administrator, who since the act has not any property in them, whatever he may have had before.

And of that opinion were the court.

Haywood and Stone being present; and they gave the administration to Miss Quince as the greatest creditor of the obligor.

#### Cutlar vs. Spiller.

DEFENDANT had given a bill of sale for negroes, without an attesting witness.

Baker, in a very lengthy argument, insisted that the instrument was void for want of attestation.

*Per curiam*.—1792, ch. 6, sec. 3, directs "that in all trials at law where a written transfer or conveyance of a slave or

"slaves, shall be introduced to support the title of either party; the due and fair execution of such writing shall be proved by a witness, subscribing and attesting the execution of such writing; but if such witness shall be dead or removed out of the state, then the probate and registration of such writing may be given in evidence." This clause supposes the case of a written transfer produced in the trial, purporting in the face of it to have been attested, and directs it to be proved by the attesting witness if to be had, because that is the best evidence. The act did not contemplate the case of an unattested transfer, and of course has given no directions relative to it; even the act of 1784, ch. 10, sec. 7, requiring registration of bills of sale of slaves, does not mean to make the transaction void as between the vendor and vendee, for want of registration or attestation, but only so far as regards creditors or purchasers, who may say it is void if all ceremonies required by the act are not complied with; but as between vendor and vendee, if none of them be complied with, the sale is good. The case now before us is out of the act of 1792, and must be decided by the rules of evidence at the common law; and by the common law a deed is not void for want of attestation, and may be proven by witnesses who did not subscribe it, or by other means.

NOTE.—The act of 1792 makes a bill of sale unnecessary where the sale is accompanied with delivery of possession;—but should a bill of sale be given, it requires registration; it would be absurd that a sale by parol and delivery of possession should be valid; and that one by deed and delivery of possession should be void, although there is evidence to prove the deed, though not an attesting witness: Surely there is more solemnity and notoriety by the deed, than by the parol contract, especially if the deed be registered. Possibly, if delivery of possession did not accompany the sale, the case might fall under the act of 1784, and then an attesting witness, a bill of sale, and registration, might be necessary; for the requisites of the act of 1784 are not dispensed with by the act of 1792, except where delivery of possession accompanies the transaction.

*Anonymous.*

**A** DIES, leaving a widow and children, and his personal estate is divided amongst them; then one of the children acquires some additional property and dies; that part of his estate which come from the father was divided amongst the mother and children; but as to the acquired part, the mother claimed the whole, as next of kin—and her counsel insisted that the act of 1768, ch. 3, sec. 1, ("And if after the death of the father, any of his children shall die intestate in the life time of the mother, without wife or children, every brother and sister, and the representative of them, shall have an equal share with the mother,

“ of the estate of the child or children so dying intestate”) did not extend to this case ;—before the enacting of this clause, she was clearly entitled to the whole as next of kin to her child—and the clause itself was made to obviate the injustice of carrying a child's part which he derived from his father, out of the family and from the children of the father, by the intermarriage of the widow to a second husband, and his children or relations ; and this being the extent of the act as is evident from a case in Atkins (which he read) and other books that treat of the subject, the operation of the clause in question should be confined to the estate which come from the father : Where the estate is acquired by the child by his own industry, there is not any injustice in carrying it over to his mother, or to his half brothers and sisters, or to his mother's relations, to share equally with those on the father's side, since both are to be supposed equally dear to him.

*Per curiam.* The clause in question was passed for the reasons given at the bar, and it is general, not distinguishing between different parts of the child's estate, as it probably would have done had the legislature entertained the design attributed to them. The reason of the clause holds equally strong in the case of property acquired by a child, as it does in respect of property derived from his father, he could in all probability prefer his own brothers and sisters to a father in law and his relations, or even to the children of his mother by him.

Let the mother have an equal share only with each brother and sister.

*Anonymous.*

**T**HE act of limitations had run about eighteen months, then the plaintiff sues and his action is continued in court about 4 years, and then he is nonsuited, and upwards of 12 months after that he renews his action, and the defendant pleads the act of limitations.

*Per curiam.* *Haywood and Stone Justices.*—If a suit be instituted before the three years are expired, and there is a nonsuit after the three years, the plaintiff may sue again within 12 months, and then only the time elapsed before the first action shall be counted : But then a doubt was conceived, whether, if the action be commenced after 12 months from the nonsuit, the time between the commencement of the first action and the nonsuit shall be counted, or only the time before the commencement of the first action, and the time after the nonsuit and before the commencement of the second action ?

*Haywood, Justice.*—If after the nonsuit a new action be commenced in a reasonable time, that time which intervened during the pendency of the first action shall not be counted, because the second suit being commenced with all proper diligence is looked upon to be *quasi* a continuance of the former ; but if it be not

commenced in a reasonable time, it will not be considered as a continuance of the former, and then the former being an ineffectual one shall not be regarded at all, and consequently the time elapsed during its pendency shall be counted. The reasonable time I speak of is ascertained by the equity of the act itself, sec. 6, to be one year.

*Stone, Justice.*—I am not satisfied, but that the time elapsed during the pendency of the former action should be rejected and then the plaintiff is not barred.

*Sic adjournatur.*—*Vide Str. 907, 3 Term 664.*

## Newbern, September Term, 1798.

*Withrington and Ferguson vs. Ann Williams.*

**T**ROVER for a negro, and not guilty pleaded; whereupon the jury found a special verdict; the counsel on both sides agreeing thereto, and to be bound by the opinion Judge Haywood should deliver thereon, which verdict was to the effect following. That the defendant had the negro and converted him; that she formerly was the widow of one Ferguson, who was killed in the battle of the Alamance; that the Legislature by a resolution, ordered one hundred pounds to be deposited in the hands of Richard Caswell, therewith to purchase negroes for the use of the widow and children—there were two children—the purchase was made of two negroes, one died, and the other being the negro in question, survived. The widow after the purchase, married one Williams, who died; after which she gave the negro in question to her son, who was the testator of the plaintiffs: and the doubt is, whether the plaintiffs have a right to recover and to what amount; if the testator was entitled to the whole negro, they then assess damages to one hundred and fifty pounds; if to two-thirds, to one hundred pounds; and if to one-third only, then to fifty pounds.

The court took some time to form an opinion, and then delivered it.

Mr. Caswell received the money in trust to purchase negroes therewith for the benefit of the widow and children; and this trust was executed, and he no longer a trustee when the purchase was made; he was not a trustee of the negroes purchased with the money. The reason why he was made a trustee, probably was, lest the widow should misapply and waste the money were it given into her care;—it is needless, therefore, to consider what the consequences would be had he been a trustee of the negroes. The property in the negroes was vested in the widow and children jointly, and the joint money was severed as to her by her intermarriage with Williams; as to the children, it was severed by the act of 1784, and each child became enti-

led to one-third in severalty: Nothing passed by the gift of the defendant, for her third vested by the marriage in Williams and belonged to his representatives at the time of the gift; the testator then having been entitled to one-third only, the judgment must be for the fifty pounds.

Judgment accordingly.

*Blount vs. Mitchell and others.*

**TRESPASS** for entering upon his close and taking and carrying away a negro named Robin, the property of the plaintiff.

The facts were, that Stanley obtained judgment against Blount for £. 444; a *fi. fa.* issued thereupon, and the sheriff returned, levied upon negroes, naming them, one of whom was the negro in question: Blount then obtained an injunction upon the terms of paying £. 296 into the office of the clerk and master; then the injunction was dissolved, and a *conditioni expensas* issued for the balance: The sheriff without making any new seizure, and without actually taking into his possession the negroes named in the return upon the *fi. fa.* advertised them for sale, and on the day of sale, Blount tendered all the money mentioned in the *venditioni*, which the sheriff would not receive, claiming commissions on the £. 296 paid into the office, on the ground that he had been at the trouble of levying upon the negroes for that sum also. The sheriff sold the negroes on the day prefixed by the advertisement, but they were not then present, nor in his actual possession at the time, but in the possession of Blount, and Mitchell purchased the negro named in the declaration; and afterwards in company with the three other defendants, went armed in the night time to Blount's plantation, and took and carried away that negro, and Blount has never regained possession of him since. Going upon the plantation of the plaintiff with force and taking away the negro by violence, is a trespass, and will subject the defendant to such damages as a jury may think proper to assess, even if the property vested in Mitchell by the sale; no man can be allowed to assert his right by violence. If the property did not vest in Mitchell by the sale, the jury should also assess damages to the value of the slave. It is immaterial what passed between the sheriff and Blount; for if the sheriff refused the money when he ought to have received it, and sold, notwithstanding the vendee's title may be good, he is to look no farther than to see that he is an officer who sells, and that he is empowered to do so by an execution; but then the sheriff should have taken the property into his actual possession, and had it present at the time of the sale—first, because personal property passes by delivery—secondly, because he cannot sell a chose in action—thirdly, for the benefit of the defendant, and to prevent fraud, lest by keeping the property out of view, he might cause it to sell for less than the value, as a purchaser

would not be likely to give the full value for an article he had not the opportunity of seeing ; but as upon this point, the defendant's counsel says he is unprepared, having not expected the objection, I would recommend a verdict assessing damages, upon the supposition that the property did not pass to the vendee, and also upon the supposition that it did pass, leaving to the court to decide upon which assessment the judgment shall be entered. The counsel on both sides agreed to this, and to be bound by the opinion Judge Haywood should give.

The jury found a verdict, assessing damages to one hundred and twenty pounds, in case the property did not pass to the vendee ; and to £. 20 in case it did.

And next day the court ordered judgment to be entered for £. 120, saying the things sold ought to be actually seized and shewn to the bidders at the time of sale, and be delivered to the purchaser ; and that the same point had been decided at Wilmington at the last term, in a cause between Bunting and Smith ; that case having been similar to this in all parts, with this additional circumstance, that a third person who claimed the negro, had obtained the possession, and had it at the time of the sale by the sheriff.

Judgment for £. 120.

*Anonymous.*

**I**F the executors of the plaintiff (dying during the pendency of his suit) will not apply within two terms after his death, computing from the day of his death, and not from a suggestion entered by the defendant, the cause will abate, and the defendants be discharged from further attendance ; but if after this the executors apply to be made parties by a *sci. fa.* or notice served on the defendants, and they do not oppose it, and the plaintiffs be made parties by order of the court, it will be too late afterwards to move for an abatement, but the cause shall be tried.

*Lotham vs. Outen.*

**T**ROVER for a negro. Dawson was the owner ; he gave and delivered the negro to his daughter now married to Outen, in 1791, and afterwards swapped him to Lotham for another, and delivered him to Lotham also ; then Outen got the possession, and on demand refused to deliver to Lotham.

*Per curiam.* Haywood only in court.—The act of 1784, ch. 10, sec. 7, requires sales of slaves to be in writing, and to be proved and registered within a definite time, or otherwise to be void ; it also directs deeds of gift to be in like manner proved and registered, or otherwise to be void : The act of 1792 dispenses with the necessity for a bill of sale, where, upon the

sale, possession is delivered to the vendee ; but it leaves deeds of gift under the regulations of the former act ; and the meaning of that act is, that upon a gift made by a parent to a child, a deed of gift shall be executed and proved and registered ; the reason for publicity which induced the legislature to pass the act, being as they considered, stronger in this latter case than in the former. Should we determine by the letter of the act that the parties are not bound to make a deed of gift, but only to register it when made, the consequence will be that this act will encourage the not making deeds of gift, and many cases will be concealed in private parol transactions, which before the act and had it not been passed would have had the solemnity and publicity of a deed ; and the act will be made to have an operation directly the reverse of what it was intended to have.

There was a verdict and judgment for the plaintiff.

### Edenton, October Term, 1798.

#### *Harromond vs. M'Glaughon.*

**EJECTMENT.** The plaintiff claimed under a state grant issued in the year 1787, for the land in question ; being a tract bounded by the river Cashoke, on one side, and then from the river so as to include a tract supposed to have been left out of the patent hereafter mentioned.

The defendant claimed under an old patent issued about fifty years ago, beginning at a hickory standing not far from the river, thence down the river a certain course and distance, which course ran obliquely from the river, and left between it and the river the triangular piece of land, for which this action is brought.

*Per curiam.* Haywood, Judge only in court.—When a deed, patent or grant, describes a boundary from a certain point down a river, creek, or the like, mentioning also course and distance, should the latter be found not to agree with the course of the river, creek, &c. it should not be regarded, but the river shall be taken to be the true boundary.

Verdict and judgment accordingly for the defendant.

#### *Sawyer vs. Sexton's administrators.*

**THE** defendant had pleaded several terms ago the general issue, covenants performed &c. release & satisfaction, and now Slade moved for leave to enter the plea of *plene administravit*, and after much argument at the bar—

*Per curiam.* Haywood, Justice, only present.—The English reporters prove this motion to be allowable and our courts have adopted the same practice ; the ground they go on is, that an administrator shall not be charged *de bonis propriis*, if at any

time before he is fixed with a judgment he offers to plead a full administration and will prove it; the court however will not suffer him to gain any improper advantage by the motion, nor put the other party under any disadvantage by his pleading so late; he must plead that he had no assets at the time of the suit commenced, nor at any time since wherewith he could satisfy the plaintiff's demand, or he must shew specially what assets he had at or since the commencement of the action. *Strange, 1073*, shews this to have been the practice in the English courts.

The court gave time to file the plea as moved for.

*Grice & Co. vs. Combs' administrators and Pons' executors.*

**H**AMILTON, for Combs' administrators, moved for leave to plead certain judgments obtained against the administrators since the pleadings in this action, which were no payment, *plene administravit*, no assets, no assets *ultra* and judgments.

*Per curiam*, after very lengthy arguments on three several days by Mr. Hamilton, *Haywood*, Justice only in court.—When an executor has pleaded in chief to an action, and has assets, both when the action is commenced and the plea pleaded, he cannot afterwards either voluntarily pay them away to other creditors or suffer other creditors to obtain judgments that will take them away; he is only permitted to give a preference to one creditor over another where no action is commenced by either, or where an action is commenced by giving judgment to one before he pleads to the other; after that period is past he has no discretion; the law therefore favoring the creditor who first obtains a plea, provided he afterwards obtains judgment.—Were this motion allowed, it would establish a contrary doctrine, namely, that though an executor had assets at the commencement of the action, and also when he pleaded, yet at any distance of time afterwards he might prefer other creditors whose debts were not even due at the time of the plea, by giving them judgment, and saying to the prior creditor, I have preferred other creditors to you by giving them judgments and applying the assets I had when you sued me to the satisfaction of their demands.

The motion denied.

*Harrell vs. Elliot.*

**T**HE premises in question were devised to the plaintiff by her father and grand-father; she married, and with her husband was possessed about 24 years; then the husband and wife by deed sold to one, under whom the defendant claims, and then the husband died: There was no endorsement on the deed purporting that the wife had been privately examined with respect to her free consent, nor was any record to that effect to be found on the county court records: And now the defendant's



counsel offered to produce one of the Justices of the county to prove that he had privately examined her and that she acknowledged a free execution of the deed without compulsion of the husband.

*Per curiam.* The act does not expressly require the acknowledgment of the *feme* to be put into writing, nor to be recorded, but it requires her acknowledgment to be in court, and to be taken by a member of the court, appointed to examine; and what is done in court cannot be otherwise proven than by the records of the court, and therefore the evidence offered cannot be admitted.

Verdict for the plaintiff.

*Winn's executors vs. Brickell.*

**D**EBT upon a bond given pursuant to the act of 1759, ch. 14, for keeping the prison bounds.

*Per curiam.* Haywood only present.—The act ordains that such bond shall have the force of a judgment, the meaning of which must be, that it shall be considered as a record so far as concerns the evidence requisite to prove it: It cannot mean that such bond shall have the force of a judgment in other respects, for an execution cannot issue upon it without notice, and after notice it cannot issue unless the fact of his having broken the bounds be made out in evidence; it is returned by a sworn officer, and is to partake of the nature of a record for the purpose of shunning the difficulty that would arise from requiring proof of its execution; it may be taken at a great distance from the place into which it is returnable, and the attendance of witnesses not easily to be procured. It is like a recognizance taken and returned to court by a Justice of Peace where there is no need to prove the party's acknowledgment.

Proof by the subscribing witness was dispensed with.

*Armour vs. White.*

**E**JECTMENT. *Per curiam.*—Haywood, Justice, only in court.—Part of the land in dispute, has been in the possession of the defendant for forty years and more, but there is no deed from the ancestors of Armour, which includes it, nor is there a deed from any other person that does. The act of limitations can never ripen such a possession into title; the act gives that effect to possessions which are taken and kept with a reasonable ground of belief that the lands so possessed do belong to the possessor, as by some deed or the like, from some person having a pretended title. If he has a deed covering other lands, and settles upon the land in dispute, he is a trespasser, and that known to himself. The second clause of the act of limitations relates only to cases of irregular conveyances made before the

act passed, and confirms them when accompanied with a seven years possession before the act, or where the possession was then continuing and should complete seven years after the act; but it extends to no case arising since the act.

## Halifax, October Term, 1798.

### *Brodie vs. Seagroves.*

**B**RODIE had obtained a judgment against Finch, had taken out execution and caused it to be levied on his effects: On the day appointed for the sale, they conversed privately together; and the goods seized were sold by the constable altogether at one bid; namely, the standing corn, household furniture and the tobacco, and Brodie became the purchaser. It was understood at the time by those present, that Brodie intended to get satisfaction out of part of the goods and to return the residue; and in consequence of this understanding, one of the witnesses forbore to bid. All the goods purchased, were, after the sale, left by Brodie in Finch's possession, who prepared the tobacco for market, and was carrying it to Virginia, when another creditor, one Lees, obtained judgment against him and execution; and by the defendant, Seagroves, a constable, seized the tobacco and sold it, having first offered Brodie to pay the amount of his judgment and costs, and take the tobacco, which Brodie refused.

*Per curiam.* Haywood, Justice.—Supposing the constable to have sold in the manner here stated, of his own accord; tho' the sale was irregular, still the property vested in the vendee; but if sold pursuant to an agreement between Brodie and Finch, then the unusual manner of the sale, (that is to say, the setting up of all the goods at one bid, especially when that tends as in the present case, to make the goods sell at a great undervalue, and consequently to disappoint some creditor, who otherwise might have obtained satisfaction of his debt also) is an evidence of fraud which is to be collected from circumstances, and will vitiate the sale *in toto*.

Verdict and judgment for the defendant.

### *Anonymous.*

**P**ER curiam. M'Cay and Haywood, Justices.—In this case there are several defendants, some of whom have been taken and others not; but the process has been carried on against them to the *pluries*, which has been returned *non est inventus*. The plaintiff may now declare against those who are taken, saying, that they with those who are not, &c. and there need not be any special entry on the record, to shew that those not taken, have been pursued to the *pluries*, for that already appears by the record.

*Anonymous.*

**PER curiam.** M'Cay and Haywood, Judges.—This action was commenced in the county court of Northampton, and the defendant pleaded in chief, and a trial was had there, and a less sum than twenty pounds found for the plaintiff; whereupon the court nonsuited him. We cannot direct the jury now to find what was the value of the demand at the time the action commenced in the county court, for we cannot see upon this record that the jurisdiction is questioned, and of course the cause must be tried as other causes are, and the jury must find the value of the demand at this time; should their verdict be for a less sum than twenty pounds, possibly the court may then see that the court below had no jurisdiction, Salk. 202; the words of 1785, ch. 14, sec. 7, are, "provided that no suit shall be commenced in the first instance, returnable to any court for any sum under twenty pounds." The court has no jurisdiction, if at the time of the action commenced, it is apparent that the demand independent of set offs is of a less value.—Here the demand by the accruing of interest, between the time of commencing the action and the present time, has become of more value, though under the value of twenty pounds when the action was commenced. The defendant should have pleaded that the sum really due to the plaintiff, was under twenty pounds at the time of the action commenced, and then the jury would have been bound to find the value at the commencement of the action, as well as the value at this day, and the judgment of the court would be against or in favor of the plea; according with the verdict, such plea would have admitted the execution of the instrument, and questioned only the *quantum*; but then the defendant could not have made set offs. 1 Wils. 19, 20. The plaintiff could not know before-hand, whether he would set off or use a cross action; and it shall not be at the option of the defendant by using or not using the set off to give jurisdiction or not to the court, for at that rate the plaintiff could never recover; when before a court the defendant would reduce the demand by a set off under twenty pounds; when before a justice of peace the set off would not be used, and the demand would be too large, and so no recovery at all to be had before either jurisdiction; had the plaintiff taken a writ of error upon the judgment of non-suit in the county court, the court now could examine the record to see whether they had given a proper judgment, and would confirm it as this case is circumstanced; but having appealed, it is to be taken that the complaint against the decision below, regards some mistake of the jury, and then there can only be a new trial by a jury here. The safest way therefore, must be to plead to the jurisdiction, and tie up the enquiry to the value of the demand at the time when the action is commenced; for if that is not done, and by the accruing of interest, the sum rises

to above twenty pounds before the cause is tried, here the court is bound to give judgment accordingly.

*State vs. Duncan Dew.*

**H**E was indicted at the last term for murder, and he now appeared at the bar; and the attorney-general moved that the sheriff might be directed to take him into custody, which the court directed.

*Davie* moved that he might be admitted to bail; and urged as a circumstance in his favour, that he had voluntarily appeared and offered a number of affidavits taken before justices of peace to shew that he was not guilty of the charge; and the court read these affidavits.

*Per curiam.* M'Cay and Haywood.—A man indicted for murder, cannot be bailed upon affidavits taken *ex parte* by persons not authorised to take them; when a coroner's inquest finds a man guilty of murder, the court can look into the depositions taken before him, and if they shew that the jury have drawn wrong inferences, the court may bail the person indicted; but the evidence before a grand jury is secret, and the court cannot know what the witness swore;—so we cannot allow bail in the present case.

*Killingsworth vs. Zollicoffer.*

**D**ETINUE for Negroes. Killingsworth married the daughter of the defendant, and in about ten days afterwards the negroes in question, which before the marriage were Zollicoffer's, were in the possession of the plaintiff, and so continued till after the wife's death, which took place about a year after the marriage, and afterwards the negroes continued in his possession a year or two, when they were again in the possession of Zollicoffer, who detains them; but whilst in the possession of the plaintiff, he the plaintiff, expressed doubts about his title, saying he did not know whether or not he could lawfully sell them.

*Davie*, for the plaintiff, cited and relied upon the case of *Carter's executors vs. Rutland*.

*Baker* argued that the case of *Carter and Rutland* went upon a presumption that the negroes were intended as a gift by the father, which presumption can only stand till the contrary appears, and in this case there are circumstances strong enough to overturn the presumption. The doubts expressed on two several occasions by the plaintiff with respect to the validity of his title, and another circumstance, that one of the negroes in question, was at the time of this pretended gift, in controversy between a third person and the now defendant, which proves he could not have intended a gift.

*Per curiam.* M'Cay and Haywood Judges.—The case cited for the plaintiff is now the established law and it governs the present.

Verdict and judgment for the plaintiff.

*Anonymous.*

THE plaintiff had taken a *capias* which was returned *non est inventus*, then an attachment upon which the sheriff returned levied on two negroes but not taken into custody, because there was no gaol of the county to keep them in. Upon this return the plaintiff took a judgment by default and afterwards executed a writ of inquiry, and had judgment final; and now *Hill*, for the defendant, moved to set it aside for irregularity, and he cited Blackstone's Commentaries; and he produced an affidavit of the defendant stating that he had not any notice of these proceedings.

*Jocelyn, e contra*—The judgment was obtained a term or two ago, and cannot now be set aside unless by writ of error.

*Haywood, Justice*.—When this court passes a judgment and the term expires, it cannot in general be set aside but by writ of error, and then only in a case where the error is in a matter of fact, to be tried by a jury; if the error be in matter of law, this court cannot reverse its own judgment for any such error, for then proceedings would be endless; but if the judgment be absolutely void, and not voidable only as if given against a person who was not served with process; or if it be taken irregularly against the known rules of the court, it may be set aside at any time on motion: here the property was not taken into the actual custody of the officer; had it been so, the law supposes notice would have come to the defendant; and without such an actual taking of the property levied on, into the officers custody, the attachment is not well executed, and does not bring the defendant into court, consequently this judgment was irregular, as having been taken against one not in court and must be set aside.

Judgment set aside.

*State vs. Parish.*

HE was indicted for murder and found guilty of manslaughter; and when he was brought into court to be burnt in the hand, Judge *Haywood* enquired of the bar, if they knew of any instances where a man had been indicted of murder and found guilty of manslaughter, when the circumstances were such as in the opinion of the court amounted to murder, where the court had required surety of the prisoner for his good behaviour, and whether the security had ever been required for a longer time than one year, saying upon the latter point, he thought there was a case reported in Barrow which decides it in the affirmative; but he had not known any instance of it in this country. Mr. *Moore* said, he recollected several instances, but not the names of the cases where it had been done, but that when he first heard it he thought it a strange doctrine.

*Per curiam.* This man's conduct has shewn him to be very dangerous to society, and as there have been precedents in this country I shall direct him to give security for his good behavior for five years, himself in £. 1000, with two sureties, each in the sum of £. 500, and that he remain in prison till this security be given.

It was ordered accordingly.

Newbern, March Term, 1799.

*Bryant vs. Allen and others.*

**M**OOORE, Judge, when a tract of land is as to part, included in A's deed or patent, and the same part is also included in B's deed or patent, and each grantee is settled upon that part of the tract, comprised in his deed which is not included in both deeds, the possession of the part included in both deeds, is in him whose deed or patent is the oldest; but if one of them is actually settled upon such part included within both deeds, for seven years together, the possession is his, and the other will be barred thereby.

*Haywood*, Judge, assented.

*Anonymous.*

**SCIRE** *facias* against an infant, who had no guardian, and it was taken out to subject his land to a debt of the ancestor.

*Moore*, Justice.—The practice hath been, as I understand, to serve the *scire facias* upon the guardian, when there is one, and upon the infant where there is no guardian, and for the court upon the return of the *sci. fa.* to appoint a guardian: This practice is liable to objection; the guardian thus appointed gives no security, and if he conducts himself improperly in the management of the defence, the infant in many instances may lose a remedy against him, for want of such security. However, as the practice has been so settled, we will appoint a guardian for this defence; but let the bar take notice hereafter, to have guardians appointed by the proper courts before the *scire facias* issues.

*Anonymous*

**T**HE counsel stated to the court, that he wished to read a deposition which had been taken for his client, upon the ground that the witness was unable to attend court, and offered to prove that fact by his client.

*Moore*, Justice.—If that has been the practice it is improper; that fact should be proven by some disinterested person.

*Haywood*, Justice.—The practice has been heretofore settled in this court, that such fact should be proven by indifferent testimony, and not by the party offering to read the deposition.

The clients oath refused.

*Blount, Executor of Ogden, vs. Starkley's administrators.*

**PER curiam.**—An order for money sent to the plaintiff and retained by him, is evidence that the money was advanced as the order directs; but an order for delivery of goods retained, is not of itself sufficient evidence of the delivery—there should be some additional evidence to prove that fact.

*Slade vs. Green.*

**EJECTMENT.** The deviser gave three lots to his wife and two children; equally to be divided: One of the children died after the death of the deviser, whereby his third descended to the surviving child, who sold two of the lots; the third was left unsold for a great length of time.

*Per curiam.* This is evidence of a partition, and that this third lot was assigned to the widow.

Verdict and judgment accordingly.

*Witherspoon and wife vs. Blanks.*

**PER curiam.** The line in controversy when run to the end of the distance called for, will not reach Cypress creek, where by the patent it is said to terminate; but to reach that must run three times the distance called for. The invariable rule in such cases is, to disregard the distance and proceed with the line, in the direction called for, till it shall intersect the creek or other natural boundary.

Verdict and judgment accordingly.

*Stanley and wife vs. ———*

**EJECTMENT.** Mrs. Stanley was the heiress of the deviser, and entitled to the lands in question, provided the will were not legally executed. It had been proven in the county court, and admitted to registration, upon the oaths of two subscribing witnesses; one of whom was a legatee. The defendant now offered a copy in evidence, and it was objected that a copy ought not to be received, for the act of 1784, ch. 10, sec. 6, only allows a copy to be given in evidence, where the will has been regularly proved, which in the present case it has not, for it appears upon the face of the will that one of the legatees was the person who assisted to prove it.

*Per curiam.* The copy is to be admitted, unless there be a suggestion of fraud, or irregularity, in the attestation or execution. It is true (as you say it has been decided in this court) that one not a party to the probate, is not absolutely bound thereby, but may cause the will to be proven again; not, however in the way now attempted, but by moving the court that took the probate, to have the parties concerned in interest cited, and to examine the evidence anew; then all parties know the point in-

tended to be litigated, and are not liable to be surprised, as they may be upon a trial in ejectment, where the defendants may not be apprised of the objection to be made: They may not know, that the will itself is to be attacked, till the trial comes on, and then it would be too late to prepare for resistance—therefore it seems unsafe, to suffer the objection now made, to prevail.—Were you by proof, to lay a foundation for presuming that there was such a fraud, as invalidates the will, it would be incumbent on the defendants to produce the original; but otherwise, the presumption is, as the will was admitted to probate and registration by a competent tribunal, that all circumstances necessary to its validity were duly established before them.

*Anonymous.*

**PER** Moore, Judge. Getting wood upon land to make tar, is a possession; and the plaintiff must enter within seven years, or he will be barred.

*Haywood*, Judge, thought it not a possession within the meaning of the act of limitations.

*Hargett and wife vs. ———*

**MOORE**, Judge.—The contents of a record lost or destroyed, cannot be proven otherwise than by a copy: It is better to suffer a private mischief than a public inconvenience, especially one of such magnitude as the introducing of parol testimony to supply a record.

*Quere de hoc.* For before the inventions of learned men and prior to all artificial rules, parol evidence was the only standard to be resorted to for the ascertainment of a disputed fact, and would be naturally receivable in all cases, as well to prove facts now proven by records or deeds, as any others, were it not for those artificial rules that exclude it, which doubtless are wise and salutary, but extend no further than the reason of their establishment goes. *Cessante ratione, cessat effectus*, the exclusion ceases, when the reason of it fails: The exclusion is grounded upon this, that a record or deed remaining unaltered, is less liable to misrepresent facts than parol testimony, and therefore a preference is given to the instrument, so long as it is in being; but as neither the foresight of man can avoid, nor his powers resist, all the accidents to which such writings are exposed; time, fire, enemies, storms, thefts, and a thousand other accidents which may destroy them so completely, that not a vestige shall remain, nor any other than parol evidence to prove the transaction; and as in such cases, the better evidence which was required while it existed, was the cause of rejecting the inferior; that rejection expires with the annihilation of that which caused it; *quando subsollitur causa subsollitur effectus*.



Parol testimony may misrepresent facts ; and so may deeds and records ; but as because in the latter, there is a greater probability of truth than in parol testimony, and for that reason the law requires them ;—so because when there is no record or deed nor any copy, parol evidence will in general relate the fact truly, and is as much better than no evidence at all, as records and deeds are superior to itself ; it ought to be received upon the same principle as they are, not because there is absolute certainty either in the one or the other ; for a record or deed may be altered, corrupted, substituted, or the like : but because in choosing probabilities, it is wise to take the best that offers. To require the production of a record or deed, when there is undoubted proof of its destruction, is to require an impossibility ; and *lex neminem cogit ad impossibilia*, to say his right shall be lost, with the record or deed that proves it ; though destroyed by invincible calamity, is to inflict punishment for the acts of heaven ; and *actus dei nemini facit injuriam*, it were far better to abolish the institution of deeds and records altogether, than to admit the position under consideration, as a consequence of them ; for all other rights, not required to be evidenced by records or deeds, are at all times capable of proof by some circumstance or other, sufficient to evince their existence ; when rights required to be thus evidenced, because of their superior value and importance, are every moment exposed to irremediable destruction, by the loss or destruction of those evidences ; all former decisions are at variance with this decision. In the time of Lord Cooke, 12 Report 5, length of possession, proved by parol testimony, was received as good evidence, of the contents of a lost record ; and there it is said, *tempus est edax rerum*, and records and letters patent, and other writings, either consumed or are lost : and God forbid that ancient grants or acts should be drawn in question, although they cannot be shewn. 2 Vezey §89, Lord Hardwick says the rule is, that the best evidence must be used that can be had ; first the original ; if that cannot be had, you may be let in to prove it in any way, and by any circumstances the nature of the case will admit ; this says he, extends not only to deeds but to records. In Cowper 109, Lord Mansfield, speaking of a lost record, says, if a foundation can be laid, that a record or deed existed, and was afterwards lost, it may be supplied by the next best evidence to be had.—Hardress, 323, 324, All. 18, 2 Nels. Ab. 759, Plow. Com. 411, 2 Term 41, Trials *per pais*, 174, 156, are to the same effect ; but I choose to rely upon the three first cited authorities, because of the credit they derive from the great characters and abilities of those who made the decisions. Records and deeds were ordained for the same purpose : that of exhibiting with certainty to future times, a true state of facts, and being equally liable to loss and destruction, it seems to be a just conclusion,

that what is evidence in the absence of a lost deed, is also evidence in the absence of a lost record. There is no quality peculiar to a deed to impress its contents upon the mind of a witness, more distinctly or indelibly than there is to a record;—in truth, a deed is less calculated for such a purpose than a record; the latter is usually made up in the presence of by-standers, attentive to what passes, and of the parties, in the presence of jurors also, who tried the cause by a sworn officer, skilled in using terms the best appropriated, to signify precisely what is done; and all this under the inspection of judges, who are bound by duty to observe all that passes, and to see that it is related exactly;—whereas, deeds are frequently executed in the presence of one or two persons only, who are not necessarily to be made acquainted with the contents; and if such a conclusion be just, then, as it cannot be denied without overturning all authorities upon the subject, but that the contents of a lost deed may be proved by parol, where there is no copy nor abstract; for which see 10 Re. 92, 93. Bull. N. P. 254. 1 Vez. 505. 2 Vez. 323. Vaugh. 78. Trials *per pais*, 276. It follows irresistably, that the contents of a lost record may be proved by the same means, where there is no copy nor any abstract to be had.

If it be argued that the party should take and preserve a copy of the record amongst his other evidences, and then the loss of the record would not prejudice him, and that it is his own fault if he neglects to do so, and the record becomes extinct;—the answer is, that in contemplation of law, he is not bound to take a copy till his occasions require it, for the law itself has undertaken to keep and preserve the record for him; to the end he may have a copy when he wants it; and therefore the not taking or not keeping a copy, cannot be imputed to his negligence: Secondly, if he take a copy, that as well as the record may be lost; yet, according to the controverted position, he cannot be let into parol evidence: Thirdly, granting he is bound to take a copy, his omitting to do so, is not a greater neglect than the not taking from the register's office his deed, before it becomes burnt, with the registered copy; nor is it a greater neglect than the not keeping safely a deed which the party is bound to keep; and yet in all these cases, parol evidence of the contents of a deed may be given, and *ergo* of the record also.

It is inconceivable why such objections shall prevail in the case of a record, when they will not in the case of a deed; and why a title, evidenced by a record, which is more capable of ascertainment by parol testimony to the satisfaction of a jury, than deeds generally are, shall be utterly destroyed, by refusing to hear such evidence of the contents; when a title, evidenced by a lost deed, shall be preserved and protected by the admission of such testimony. The accidents which have happened to records in this state, are very numerous; many were destroyed

in the late war ; many have been lost by the carelessness of the officers who had them in keeping ; and in not a few instances, whole offices with all their records have been consumed by fire ; and it is believed, there is hardly one instance in a thousand where the party has taken a copy : These circumstances render the present subject one of great importance in this state, since the proposition, which the foregoing remarks are intended to combat, is calculated to operate the extinction of every title, held under such circumstances. And it is mine, as well as it is the right and duty of every citizen, whose pursuits enable him to do so, to canvass freely every rule which is to affect our rights, laid down in courts of justice ; and upon sufficient reasons appearing against any of them, to present such reasons to the public view : and preserving always a decent regard for those entrusted with public authority, who are without doubt, men of talents and integrity ; to endeavor to weaken at the threshold, any opinion, which once gone forth, is likely to acquire stability from the respectability of its origin, and to have a fatal influence upon many honest titles ; which, were the extent of the rule including parol testimony, well understood and applied, might rest in perfect security under the protection the law has provided for them.

*State vs. Piver.*

**H**E was indicted for the murder of a negro slave, and now upon his trial it appeared, that returning home from a neighbour's house, with a gun, in a public road, the deceased came meeting him, and the prisoner, a boy of about 13 or 14, said to him jocosely, stand off or I will shoot you ; my gun is charged with buck shot: The deceased continued to walk on, and Piver got before him on that side the road which the other had taken, whereupon the negro shoved him with some violence to the other side of the road, and Piver would have fallen had he not caught on his hands ; the deceased passed by, and Piver rose up and shot him, so that he died.

*Per curiam.* This is manslaughter ; and in the act of Assembly against the malicious killing of slaves there is no punishment affixed to manslaughter ; so he must be acquitted.

Verdict accordingly.

*Hobdy vs. Charles and James Egerton.*

**T**HIS action was for the recovery of a male slave ; he had been left by the will of their father to the defendants, who were infants ; their elder brother brought the negro from South-Carolina and sold him to Hobdy, and then returned to South-Carolina, and lived near the defendants six or seven years after their arrival to full age, and they never questioned the sale nor inter-

rupted the plaintiff's possession until soon after the death of the elder brother, when they got the negro into their possession, whereupon this action was instituted.

*Per curiam.* Those circumstances are proper to be left to the jury, who may if they think proper determine upon them, that such acquiescence is proof of a confirmation of the bargain after their arrival to age.

The jury found for the plaintiff, and the defendants moved for a new trial but the court refused it.

*Anonymous.*

**T**HE plaintiff claimed under an execution and sale thereupon by the sheriff; and produced the the execution.

*Moore, Judge.*—He must produce the judgment also; otherwise the defendants property might be taken and sold by an execution issued without authority; the judgment is the warrant for the execution, and without it no execution can legally issue.

*Hoywood, e contra.*—When an execution issues to the sheriff from a proper court, he is bound to execute by a seizure and sale, without enquiring whether there be a judgment or not, or whether it be a legal one or not; and if he is bound to sell, it is contradictory to say that none shall purchase. There are cases where the judgment must be produced, but they are very distinguishable from the present which is the case of a vendee. If there be in fact no judgment, or a void one, or one liable to be vacated for irregularity, or reversed; and the plaintiff will take out execution thereupon, he is liable for the consequences: And therefore when sued he must produce the judgment as well as the execution that the court may see it is a good judgment, so if the sheriff seize goods in the possession of a third person (who claims them by a conveyance from the defendant) as still belonging to the defendant, alledging the conveyance to be fraudulent; he must produce the judgment, to prove that the creditor is a *bona fide* and a judgment creditor; and consequently, one against whom a conveyance without a fair and valuable consideration, is fraudulent within the act. The books say, strangers to the judgment and execution must produce the judgment; but the meaning evidently is as before stated; for if a third person, a stranger, against whom no allegation of fraud is made, sues the sheriff for a seizure of his goods by execution, neither the judgment nor the execution will avail the sheriff, for the execution gave him no authority to seize the goods of the plaintiff, and the judgment need not be produced but where it will avail the producer. The vendee is a stranger to the judgment, but as he is no way answerable for the illegality, or invalidity, or irregularity thereof, he need not produce it. Suppose the judgment be vacated or reversed after the sale, he shall not lose the property for that; and if he shall not, why require him to produce the

judgment? which altho in the mean time it be vacated or reversed, and so not to be produced; or if produced with the reversal or vacat annexed, is not to impeach his property? Granting he is not to be affected, how illegal or irregular soever the judgment may have been, it is surely useless to require a production of the judgment; it can answer no purpose but to shew there was a judgment of some sort either good or bad, when the execution issued; and of what advantage is that? for if his title continues, tho' the judgment be a void one, shall it not also continue though there be no judgment at all?—where is the difference? The reason of the first is because he purchased from a public officer, having a lawful authority, namely, the execution, issuing from a proper court, attested by the proper officer. Will not the same reason apply with equal force to the latter? Were vendees liable to lose the property, whenever a judgment should be declared illegal, or void, few would purchase at execution sales; for very few are qualified to form an opinion on that head, admitting they had the record to inspect, and frequently that is not to be had, but at great expence and trouble; for instance, when an execution issues from Currituck to the sheriff of Buncombe, must the intended vendee go all the way to the former, inspect the record, get a copy of it, and lay it before counsel and take his opinion upon it before he dare purchase? There can be no necessity for all this. In all cases of irregular and illegal judgments, the plaintiff is answerable to the person injured, and not the vendee: And there is no reason why he who is in fault, and not the vendee, who is in no fault, shall not be exclusively liable, when in fact there is no judgment; a circumstance easily set right by a *supersedeas*, and other remedies, and one that can in fact but very seldom happen. Is it advisable then, in order to avoid an evil barely possible, so easily rectified and obviated, and so little to be apprehended; to introduce that really serious and great one indeed, of rendering execution sales, which are the life and soul of the law, the subject of doubt and suspicion; by making it dangerous and imprudent for all men to purchase at them, unless they know there is a legal judgment, which for the most part it will be impossible for them to know with certainty.

*Taggart vs. Hill.*

CASE against the defendant for a misbehavior in his office, in re-delivering the goods of one Walk, seized in execution, without levying the money—there were two other counts, but the cause rested upon this. The following facts appeared upon the trial: Taggart obtained a judgment in the county court of Wayne, against Walk, took out execution thereupon and delivered it to Hill, the sheriff of Franklin, to be executed, who seized Walk's goods in execution, and appointed a day of sale by advertisement; but having on that day or before, received an injunction issued by Judge Williams, he released the

goods and re-delivered them to Walk, who afterwards disposed of them and became insolvent. Hill returned upon the execution "stopped by injunction."

*Badger* for the plaintiff.—An execution is an entire thing, and when once begun to be executed, cannot be stopped; it must proceed, though a *supersedeas* or injunction be delivered to him before the sale. The defendant, by a seizure to the value, is discharged of the debt, and cannot afterwards be resorted to. Should the sheriff forbear to sell, the goods being perishable, may be consumed, and the plaintiff lose his debt: To prevent this mischief, the sheriff must sell and not re-deliver the goods, for then the defendant will have his goods and not be liable to any further execution; or if liable, he may waste and consume them, and become insolvent. The defendant being discharged by a seizure to the value, the property in the goods seized, vests in the sheriff, and he becomes answerable to the plaintiff; he may sue the defendant in trover or trespass, for taking them away before the debt is satisfied; which proves, that after the seizure, the defendant is not entitled to them—consequently a re-delivery by the sheriff is a wrong act, which subjects him to answer the debt to the plaintiff: And to prove that an execution is an entire thing and cannot be stopped when once begun to be executed, he cited 1 Burr. 30, 34. Cro. El. 597, Dyer 98, 99. L. Ray, 1072, 1075. Salk. 147, 323.

*Baker, e contra*, cited a case from Washington's reports, decided by the court of errors and appeals in Virginia, where a defendant taken in execution upon a *ca. sa.* had been released by the sheriff on the receipt of an injunction, and held well. He argued, that however the practice may be in England, it is very proper in this state, that the goods should be re-delivered; there the money is deposited before the injunction issues, and can be easily borrowed, owing to the great influx of money and paper representing money, their extensive trade has put in circulation; but here it is sometimes, nay often, next to impossible to procure it upon any security: There, if money must be raised after the execution is begun to be executed by a seizure, it may be raised by a security from the goods at a moderate rate of interest upon the money, without a sale of the goods; here it cannot be procured in most instances but by a sale, and that too at a great undervalue; and this completes the mischief the injunction means to avoid. Were a deposit required in this state in all cases before an injunction could issue, that alone would prevent them in many cases, where really essential to justice. The practice in this state has always been to re-deliver the property upon receipt of the injunction, though no deposit has been made, and this is some proof of what the law is.

*Moore, Judge*.—The cases cited for the plaintiff, are sound law: The defendant is necessarily discharged of the debt when

the sheriff has seized property to the value. By the act of seizure, the property is divested out of the defendant until the debt be satisfied and vested in the sheriff, who becomes absolutely answerable for the debt.—The defendant is liable to an action of trover or trespass, to be brought by the sheriff as owner, for taking away the goods; and the defendant being once discharged, can never afterwards be charged by any new process, nor can the sheriff's liability be done away by any writ or process issuing after the seizure: An injunction has no such effect; that is a writ of modern date, in comparison of the rule about the entirety of an execution; its lawfulness was violently opposed and denied by the common law judges, as late as the reign of James the first; it is a creature of the court of equity, which has no power to alter any common law rule nor its operation, and which could never act upon property by any process, but in personam only. Till our act of 1787, ch. 22, sec. 2, our injunction could not affect the property, and can only subject the person who disobeys it to attachment; it cannot in strictness issue to the sheriff, who has the goods by seizure, but to the plaintiff in the action only:—The sheriff, who has made a seizure, cannot legally take notice of an injunction, and must proceed as if none had issued; that is to say, by selling the goods and bringing the money into court; consequently the defendant should not have re-delivered the goods to Walk; and having done so, is liable to the plaintiff's action.

*Haywood, Judge.*—The injunction in this state possesses the same effects and qualities precisely as the injunction in England. There has been no act of Assembly to give it different effects or qualities: Also the cases cited for the plaintiff about the entirety of an execution, are good law; still it seems to me the sheriff acted properly in re-delivering the goods. The apothegm, that an execution is an entire thing, and cannot be stopped when once begun to be executed, contains no reason in itself, and is not accompanied by any in the books cited, that shews why the law is so;—it becomes necessary then, to search for the reason, and to discover it, in order to understand how far it extends, and to what cases it is properly applicable.—One of the books this moment cited since I began to speak, says, an injunction shall stay the goods in the hands of the sheriff; admitting it to be so, that proves the rule about the entirety of an execution, to be inapplicable to the case of an injunction; for by the rule, it is necessary to proceed and sell; if we discover that the reason of the rule is not universal and reaches only to particular cases, the universality of the terms in which it is conceived, must be restrained to those cases. When the plaintiff obtains judgment, and takes out execution, the law still allows the defendant to have the cause further examined, and provides various means of doing so, suited to each particular case of hardship; as by

*supersedeas*; writ of error, certiorari, &c. but in granting this indulgence, it were unjust to place the plaintiff in a worse situation than he stood in at the time the *supersedeas*, writ of error, &c. issued. If he has gained a security for his debt, by a seizure to the value, that shall not be taken from him without giving an equal or better security; and as no such security was given at the common law, of which this is a rule, prior to issuing the *supersedeas*, writ of error, &c. the goods when seized, were to be retained in the hands of the officer or sold; and it would be vastly inconvenient to all parties that they should be retained in the hands of the officer—for if perishable, they may be destroyed in the interim; if living animals, they may be fed; or if inanimate, may require a warehouse: By destruction, the value is lost to the plaintiff or defendant, and so it is if the expenses eat up the value. It is better for all parties that they be sold; and it is for that reason that the law orders a sale, notwithstanding a *supersedeas* or other writ in the nature of a *supersedeas*, which issues at the common law without any security previously given;—hence arose the quaint saying, that an execution is an entire thing, and cannot be stopped when once begun to be executed; the reason of it extends to no case where a security equal to the seizure, is given by the defendant before he obtains process for a stay of proceedings:—Will it then apply to the case of injunction? In England, when an injunction issues after verdict and before execution, the money must be deposited. *Cursus Concellariæ*, 447. If after execution has issued, the money and costs recovered at law must first be paid into the court of equity. *Cursus Concellariæ*, 448. 2 Brown's Ch. 14, 182. Ch. C. 447. We must not look into the old books for the properties of an injunction; the writ itself is but of modern origin, and like other things, has been matured and fitted for the transactions it is used in, and has but lately acquired perfection. When money is deposited, it is unjust to retain the goods any longer, and it is unnecessary to the plaintiff's security; much more unjust would it be to proceed to a sale—hence it is deducible that the goods are to be re-delivered; and if this be the effect of an injunction, issued after a verdict in England, the next question is, has any law or established practice altered such effect in this state? There is no act of Assembly for that purpose; and the practice before the revolution, and for five years last past, has been either to deposit the money or give security to pay the debt, in case of a dissolution; according as the circumstances stated, were more or less favourable for the complainant. The proceedings of the old court of chancery in this country have been inspected, and they prove the practice to have been as I state it; but why require a bond if the goods are to be retained? If they are to be sold, notwithstanding the injunction, and if the defendant is also-



lately discharged by a seizure to the value? The plaintiff cannot possibly have any cause of complaint for which he may sue upon the bond; he has the full benefit of the seizure and of the security detained by it: It follows, that either the bond is filed for no purpose, or that the goods are to be re-delivered; and it is more reasonable to presume the latter than the former—the more so, seeing the universal practice has been to re-deliver the goods, which, though it may not make the law, is evidence in a doubtful case of what it really is; and as our act of 1802, directs the proceedings in our present court of equity, to be like those in the court of chancery under the old government;—upon this view of the subject, the defendant acted rightly in re-delivering the goods to Walk: It is indeed a misfortune which occasions this dispute—the money not having been deposited nor security given before the injunction issued; that is not the fault of the defendant, who was bound to obey the writ without enquiring whether all necessary steps were taken before it issued. As to the book which says the injunction shall stay the goods in the hands of the sheriff, it is an old authority; there is no fee allowed by law to the sheriff for such service; the position is against first principles, for the goods may perish or incur an expense in the keeping. It is more agreeable to principles that they should be sold; and if they must be sold, the injunction is a dead letter. The property of the goods is not absolutely divested out of the defendant by seizure, for if the money be paid, he shall have them again; and that is done by a deposit.—And as in this country, owing to the circumstances stated by the defendant's counsel, a bond is in some instances substituted in the place of a deposit; a security instead of satisfaction: The effect of an injunction in both cases is the same; but in the latter, after a dissolution an execution *de novo* may issue, for the defendant absolutely discharged by a seizure where he is passive, and does no act to obstruct the consequences of a seizure: but where, by his own act and at his own instance, the goods are released upon an allegation made by himself, that he is not chargeable, it is no hardship upon him when upon further scrutiny it turns out that his allegation is not true: If he is subjected by a new writ, and the constant practice in this state hath been in such cases to issue a new *fi. fa.* after a dissolution, and not a *venditioni exponas* or *distringas* against the sheriff who seized.

Verdict for the defendant.

NOTE.—This case happened some years ago in the district of Halifax: The defendant whose name I think was Robinson, was taken and imprisoned upon a *ca. sa.* and then obtained an injunction and was discharged; and though the plaintiff's debt became desperate, and was actually lost by the discharge, as well as I recollect, no advice was given to sue the sheriff.—This case

happened in the district of Salisbury, eight or nine years ago ; a defendant's goods were taken in execution, then an injunction issued ; the goods were released, and the defendant immediately removed himself and his effects to Georgia, and no one advised the suing the sheriff ; then the injunction was dissolved, and no property to be found. About six or seven years ago at Salisbury, this case happened : The sheriff of Rockingham (Mr Joyce, as well as I remember) was indicted, because having taken the defendant in execution, who afterwards exhibited a bill and procured a Judge's fiat for an injunction, and shewed that to the sheriff on the day of sale, not having time to go to the office of the clerk and master ; the sheriff, supposing the fiat not sufficient, had proceeded to sell ; and for this conduct, both he and the plaintiff were convicted of trespass and fined ; two judges being present, as well as I remember. Numberless cases have occurred where the goods have been re-delivered, and where afterwards new executions issued : were all such sales illegal ? And the plaintiffs liable to be sued or to make restitution ? And must the sheriffs in all such cases be resorted to ? Or are they still liable in all cases to be resorted to where the goods have been re-delivered, and afterwards none to be found ? Notwithstanding the general opinion hath been hitherto, that they did but their duty in making re-delivery and were no ways responsible afterwards ? If so, the law suits to arise from this source are innumerable and the effects incalculable.

*NOTE.*—It was attempted to defend the sheriff on another ground ; namely, that the bill of costs annexed to the execution, contained some abbreviated words, and that therefore he ought not to have executed the writ : The words of 1784, ch. 7, sec. 2, are—and to the said execution shall be annexed a copy of the bill of costs, of the fees on which such execution shall issue, wrote in words at length without any abbreviation whatsoever ; and all executions issuing without the copy of such bill of costs annexed, shall be deemed illegal, and no sheriff shall serve or execute the same.

*Per curiam.* That clause relates to executions for costs, not to those or such parts of those as are for the judgments ; and in the present case, though there be an abbreviation, that will not justify the sheriff in not levying the principal, however it may operate as to the costs.

*Anonymous.*

**D**ETINUE for a negro slave, proven to have been given and delivered to the plaintiff in the presence of witnesses, and to have been kept and continued in possession of the plaintiff's guardian for several years.

*Harris* objected that there should have been a deed of gift recorded.

*Moore, Justice*—That is not necessary ; the act of assembly does not require that there shall be a deed of gift, but that when there is one it shall be recorded.

The next day *Harris* moved for a new trial.

*Haywood, Judge*—I am of opinion, as this case is circumstanced, that no deed of gift was necessary. The words of the act of 1784, ch. 10, sec. 7, are, Whereas many persons have been injured by secret deeds of gift to children and others, and for want of formal bills of sale, and a law for perpetuating such gifts and sales ; for remedy whereof, be it enacted, that deeds of gift of any estate, of whatsoever nature, shall be proved in due form and recorded, &c. and deeds of gift not authenticated and perpetuated in manner by this act directed, shall be void. The evil to be remedied, was the want of a law for perpetuating gifts and sales, which before that time had been used to be made secretly, and the remedy was designed for the benefit of creditors and purchasers, for none others could be injured for want of a perpetuation. Here are no creditors nor purchasers concerned ; the mischief meant to be suppressed, does not exist ; Neither was this a secret transaction, incapable in itself to produce publicity, for a delivery is made and possession openly and publicly kept continually afterwards ; not that secret transaction the act aims at : had it been secret, and had a creditor or purchaser been concerned, a deed of gift would have been necessary ; otherwise the act would have the operation to make the generality of such transactions more secret than they would have been, but for the act, for no deed of gift will ever be made where the gift is intended to be kept secret ; if when made, it must be recorded and made public ; but if not made, the gift will be good without it—and doubtless this effect is against the spirit of the act.

Edenton, April Term, 1799.

ALFRED MOORE, }  
JOHN HAYWOOD, } Judges.

*Armour vs. White.*

**EJECTMENT.** The land in dispute was one hundred acres, part of the lands granted by an old patent to Thomas Stanton, who conveyed the said hundred acres to William Armour, who had a son, Theophilus, who had a son, William, the lessor of the plaintiff, who left this country in the year 1768, and settled in South Carolina, and never made any claim after going away till just before the commencement of this action. Stanton, in 1714, assigned the land, comprized in a certain plat to Guthrie, in order that he might obtain a patent for the same, but the plat was not shewn to the court ; and in 1716, a grant issued to

Guthrie, for one hundred and ten acres; the lines of which grant included a part of the hundred acres in dispute; and under this patent, the defendants claim the whole hundred acres. They, and those under whom they claim, have possessed a part of the hundred acres in Guthrie's patent, upwards of forty years; that is to say, they cleared and cultivated part of an adjoining tract, and extended a part of that clearing, over a small part of the hundred acres lying within the limits of Guthrie's patent: And they proved by several old deeds for lands adjoining that part of the hundred acres which was not included in Guthrie's patent, that the lines of the hundred acre tract on that side, were reputed the lines of those under whom they claim.

*More, Justice.*—The possession of part of a tract, circumscribed by marked lines, is a possession of the whole tract within these lines.—If the defendants possessed the part mentioned in the evidence, claiming under Guthrie's patent, their possession extends to the lines of that patent and no further; but if they possessed this part claiming as far as the lines of the hundred acre tract, then their possession extends to the whole tract. A naked possession for seven year, without entry or claim, will bar the right of entry, of all adverse claimants: And a possession, with colour of title for seven years, will give to the defendant in possession, and absolute right against all others forever.

Verdict and judgment for the defendant.

*NOTE.*—In this case a grant dated in 1663, was seen by Mr. Price, a witness, and it ran across the tract in dispute.

*NOTE.*—This distinction between a seven years naked possession, and a seven years possession with colour of title, (though the decision in this case was proper for other reasons) is as I apprehend, founded upon a wrong construction of the act of limitations. It supposes the second section, intended to operate upon future cases in such manner as to give a right to the defendant; and that the third section, is intended to operate, by tolling the plaintiff's entry, or taking away his right of possession, so as to disable him to recover in ejectment without affecting the property or mere right, which he may recover in a writ of right. It will be attempted in this place to be evinced, that such a construction is erroneous; and to be shewn what the genuine and true meaning and operation of the act is, it being of very great importance to the public, that this act should not be misunderstood.

First, then, as to the second clause: It was passed in the year 1715, prior to which period, no office for the registration of deeds and mesne conveyances had been established, consequently bargains and sales were not used in this country, for they were void unless enrolled within six months; the act of 1815, ch. 38, first established these offices: Fines and recoveries were not in

use; that is declared in the preamble of the act of 1715, ch. 28; feoffments or livery and seizen are spoken of in the sixth section of 1715, ch. 38, as a mode of conveyance practised in Great Britain, implying that it was not in this country: There is no vestige upon the records of any court to shew, it ever was practised in this country, prior to 1715. There could not have been then any certain known mode of conveyance, by which one individual could convey lands to another; and this difficulty we may readily suppose was rendered not the less perplexing by the illiterateness of the first settlers. All, or the much greater part of the conveyances which had been made for want of legal forms and solemnities, must have been liable to be invalidated. We learn from the act itself, that creditors had sold, or caused to be sold, the lands of their debtors; though there was no law for the sale of a debtor's land till the 5 Geo. 2, ch. 7, in the year 1732. Executors and administrators had sold lands which no law justified; husbands and wives had sold the lands of their wives, which was illegal before the act of 1715, c. 28; or husbands had sold the lands of their wives, for which there never was any law; and sometimes patentees knowing of no better mode, had conveyed by endorsement of patents, or by some other similar means; all such conveyances were invalid; every possessor under such titles was liable to be ousted. Under such circumstances, the country must necessarily have been in a state of great inquietude: There existed two great evils, demanding the interposition of the legislature—First, the want of a certain established mode of conveyance—Secondly, a confirmation of the titles thus irregularly obtained. The first, they remedied at this session, by the two acts of 1715, ch. 28; entitled, "*feme coverts, how to pass lands;*" and 1715, ch. 38, entitled "an act to direct the method to be observed in conveying lands," &c. The latter they provided for, by the clause now under consideration: "All possessions of, or titles to any lands derived (not which shall be derived) from any sales made, either by creditors or administrators of any person deceased; or by husbands and their wives, or husbands in right of their wives, or by endorsement of patents or otherwise; of which the purchaser or possessor, or any claiming under them, have continued or shall continue in possession of the same for seven years, without any suit in law, be and are hereby ratified, confirmed and declared good and legal to all intents and purposes, whatsoever, against all and every manner of persons," &c. Here is not any exception in favor of infants, *feme coverts*, &c.—When speaking of titles, it mentions them in the perfect tense, "derived," equivalent to already derived, because such only were the titles they intended to ratify; but considering that some such titles had been derived within seven years next before that session, and would not be ratified for want of a seven years possession, unless provisi-

on were made for them ; When they came to speak of that, they use both the perfect and future tense, " have continued or shall continue ;" the former relating to titles made more than, or as long as, seven years before ; the latter to titles derived within seven years before, but which were equally with the others to be ratified, provided a seven years possession should be completed, though part of it might be after the act. They speak of them as invalid titles, (though many of them such as those by endorsement of patents and by husbands and wives, came from those who actually had the title and were certainly good unless for want of legal form) shall be ratified and declared good and legal ; importing that they were not so but for the act : Now the Assembly could not mean to ratify and confirm such illegal conveyances if made afterwards ; for in order to prevent the like inconveniences and inquietudes for the future, they at this session declared how lands shall be conveyed ; and moreover that no conveyance shall be good unless acknowledged or proved and registered. Shall all such unproved, unacknowledged, and unregistered titles as those mentioned in the second clause, and which are here expressly prohibited, be still continued and still practised and confirmed ? Did they suppose, notwithstanding the act pointing out and ascertaining the legal method of conveyance, that the irregular ones mentioned in the second clause would still be used ? The contrary is certainly evident : They could not have supposed that after this session, the people of this country would so generally disregard the mode prescribed, as to make it expedient before hand, to provide for such irregularities, and therefore the second clause must have been made with a retrospective view. Again :—there is no exception in this clause in favour of feme coverts, &c. but the titles here spoken of, are to be confirmed and declared good and legal, against all and all manner of persons. The object of the legislature, that of quieting the country with respect to all existing causes of uneasiness, required that no exception should be made ; for then femes coverts, infants, and the heirs of such, might still be a cause of apprehension to great numbers of settlers, and the remedy would be partial and incomplete ; whereas they intended an effectual and complete one, one which in three or four years should put all things in quietness ; therefore the exception was designedly omitted out of this clause, and the strong expression " all and all manner of persons" inserted, though that exception is made in the third clause. Now to try the effect of the second clause : Let it be admitted, that it has an operation upon future cases ; and suppose a husband has conveyed the land of the wife since the act ; and that the possessor has continued seven years in peaceable possession ; the wife being alive all the time : Will such a possessor have a good right forever, against all and all manner of persons, the feme covert not excepted ; although in

the exception to the third section, her title is saved to her, till after the coverture? Either the possessor will not have a title under the second clause, or the feme covert will lose hers, tho' saved by the fourth; or the repugnance must be avoided, by giving to the second clause a retrospective and not a future aspect, in which case the whole is consistent. Again: Let us suppose that a husband and wife since the act, have joined in a conveyance of the wife's land, as directed by 1715, ch. 28; would not such conveyance be good without the aid of the act of limitations? and would it not follow, that the legislature were occupied to no purpose, when busied in declaring, that such conveyance should be confirmed, when or after the lands should have been possessed for the space of seven years? And as such a conveyance before the act, did really stand in need of assistance, *aliunde* is it not fair to conclude the clause in question respected such a conveyance made before the act, but not such a one when made after it? Again, if by this clause the defendant's title be ratified forever as to future cases, it is a perpetual bar to the plaintiff; and then if it can be shewn as to future cases, that the third clause operates also as a bar to the plaintiff, it follows that either both clauses are for the same purpose, which cannot be imagined, or that the second regards past transactions, whilst the third and fourth regard future ones; and moreover, it will follow that the second, bars perpetually; when there is possession with colour of title; and the third bars by possession without colour, as the opinion I controvert supposes: that either the second is useless; for why require colour of title when the next clause dispenses with it altogether, and forms a complete bar without it, producing the very same effects without, as the former does with it? Or that the second respects past transactions only. Now then, what say the third and fourth clauses? No person shall enter or make claim but within seven years, and in default shall be disabled from any claim therefore to be made; except feme coverts &c. who have a longer time allowed; "but that all such possessions, without suing such claim as aforesaid, shall be a perpetual bar, &c." If a naked possession, as the opinion supposes, under these clauses, will work a bar, is not that bar, however operated, a perpetual one? And admitting the plaintiff to be perpetually barred, the defendant's title is perpetually confirmed, and then the third and fourth clauses without any colour of title, operate the same effects precisely, as the second clause with colour of title, and consequently the second was never of any use; unless it related to titles before the act; which if it did, it was as beneficial and as useful a clause as any in the act. These considerations seem to me to prove, that the second clause has not a prospective view, and that with regard to it as relating to cases after the act, it is erroneous to say a colour of title with seven years, will give a right in fee to the possession; for though a colour of title with seven

years possession, does, as I contend, really have that operation; it is not by reason of any thing contained within the second clause, but arises from the true construction of the third and fourth clauses. I think it may upon the whole be fairly concluded, that the latter member of the above distinction, as founded on this clause, is not warranted by it.

And this brings us to the other part of the distinction, namely, that a naked possession for seven years, tolls the right of entry of the plaintiff, and bars his ejectment, but not his writ of right. This is a construction upon the third and fourth clauses; and I shall endeavor to shew that it is equally erroneous with the other. In addition to controversies arising from informal conveyances, there were others of a different complexion: Conveyances made or to be made, by persons having no title, though apparently seeming to have one, or being understood to have it, before the extension of the boundary lines between Carolina and Virginia, lands supposed to lie in Virginia, had been granted by the governors thereof, and had been neglected and deserted by the patentees, and had been again granted by the Lords proprietors; entries of lands had been made in the land office, and the same lands were afterwards entered by others; patents had been obtained, and the same lands had been afterwards patented to others: all this appears in the preamble, and by such means as another part of the act complains of: Titles had become so perplexed, that no one knew of whom to take or buy lands; if he purchased from one patentee or grantee under him, an elder might be produced, and he be turned out of possession;—thus it happened as the act also complains, that the dread of elder titles and the expectation of heirs, under dormant deeds and grants, was “likely in a short time to leave much land unpossessed,” it was necessary to remove these obstacles to population, and to that end to provide some criterion by which a man might know of whom to buy lands, notwithstanding the several conflicting grants or deeds for the same; and to ensure him of security, notwithstanding there might be unknown prior grants to that under which he purchased; every instance given, either in the preamble or body of the act, evinces an intention to settle disputes between claimants under opposite deeds or grants for the same land. Ancient titles to lands granted by the governor of Virginia, were likely to disturb those who had obtained titles here, (for I understand such grants were legalised by compact between the King and Lords proprietors) or the lands have been deserted by the first patentees, and a latter patentee had taken possession; or former entries or patents threaten the titles of possessions under latter entries or patents; and proves that the person to be protected by the provisions of the act, was one who had an appearance or colour of title by a subsequent deed or grant, as well as the person to be barred. Such were the evils.



to be remedied, and such the design of the legislature ;—and they have applied the remedy in the following words : “ No person or persons nor their heirs, who hereafter shall have any right or title to any lands, tenements or hereditaments, shall thereunto enter or make claim, but within seven years next after his, her or their right or title which shall descend or accrue ; and in default thereof, such person or persons so not entering or making default, shall be utterly excluded and disabled from any entry or claim thereafter to be made : If any person that is or shall be entitled to any right or claim of lands, tenements or hereditaments, shall be at the time the said right or title first descended or accrued, come or fallen within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned or beyond seas, that then such person or persons shall and may, notwithstanding the said seven years be expired, commence his, her or their suit, or make his, her or their entry, as he, she or they might have done before this act ; so, as such person or persons shall within three years next after full age, discoveriture, coming of sound mind, enlargement out of prison, or persons beyond seas, within eight years after the title or claim becomes due, take benefit and sue for the same, and at no time after the times or limitations herein specified ; but that all possessions held without suing such claim as aforesaid, shall be a perpetual bar against all and all manner of persons whatsoever, that the expectation of heirs may not in a short time leave much land unpossessed, and titles so perplexed, that no man will know of whom to take or buy lands.” Upon these clauses, the opinion in the case of Armour and White, admits that an adverse possession is necessary, for this is implied in the words “ enter or claims ;” each of which technically signifies a getting the legal possession from one who is actually in possession, either by going upon the land or claiming as near to it as he dare go, for fear of the possessor ; and is unequivocally expressed in the exception to the third clause, “ but that all possessions held without suing such claim as aforesaid,” &c. referring to the terms used in the third clause, and signifying the understanding of the legislature to be, that such claims as are spoken of in the third clause, were to be exerted within the limited time against some actual possession ; so far the opinion is right ; for it would be absurd to say a good title shall be barred by not entering within seven years, when no adverse claim or possession hath been set up. But whence is it inferred that these clauses bar the right of entry only ? The policy of the act was, that settlers should know of whom to purchase with safety ; not a temporary title, capable to resist an ejectment only, but a permanent one, capable of encouraging them to clear, cultivate and improve the lands, and such as they might transmit to posterity ; and answerable to this policy, the possession here spoken

of, shall "utterly exclude and disable" the party out of possession from any entry or claim thereafter to be made; and for fear these words were not sufficiently expressive, it is added, that all such possessions shall be a perpetual bar to all persons, &c. It might possibly have been understood from the wording of the former clause, "shall be utterly excluded from any entry or claim thereafter to be made," that the legislature meant only to prevent the entry or the action founded upon a right of possession, leaving the property or mere right, unaffected; and to obviate such a mistake, they have in the next clause carefully varied the expression, "shall be a perpetual bar to all and all manner of persons;" not only the claim and entry, but all persons shall be barred: Of what? Not of any particular action or mean of getting possession but generally and perpetually.—Again: feme coverts and the like persons "shall sue" within the time limited for them, "and at no time afterwards." Can it be meant that they shall never sue nor have any action whatsoever afterwards; and that all others may sue after the time limited for them in a writ of right? When their disabilities are removed, they stand in the view of reason and justice in the same predicaments as other claimants—certainly in no worse; they are not more in fault for not suing within the prescribed time than other claimants, yet they shall never bring any action afterwards; they are excluded from the privilege of suing forever—and consequently so also must all others be, unless a sufficient reason can be assigned for placing these favored persons on a worse footing than others. Supposing this to be law, it were far better for them; the exception intended to benefit them had not been made—for then after the seven years were expired, they might still sue a writ of right within sixty years, as the opinion supposes others may:—Since then, the bar formed by these clauses, is a *perpetual* bar against all *claims*, all *entries*, all *persons*, and all *suits*; it takes from the plaintiff all remedy, and consequently all title and right, and vests in the defendant necessarily, the absolute dominion forever; or in the language of the law, an *indefeasible fee simple*.—And as this accomplishes the object of the legislature, which was to quiet possessions, and to furnish the means of knowing with certainty from whom out of many claimants, to purchase or buy lands with safety; and as that object would not be accomplished, were the bar only temporary, and the title still liable to be questioned in a writ of right, it seems to me there can be little or no doubt, but that is the true operation of the act, and of course that it is a mistake to say it bars the right of entry only; that it is a mistake is further confirmed, by considering that there is no instance to be found in the judicial records of this country, where a writ of right was ever instituted and maintained. Although were it a sound position that the bar is but temporary, there must have

been a great number of occasions rendering the use of that writ essential to the recovery of lands—the right of possession to which had been lost, though not the right of property: And not a single instance since the year 1715, is strong evidence to prove that it cannot be used; and consequently, that the exposition given by our ancestors, who were cotemporary with the first operations of the act, was, that the clauses in question operated a perpetual bar; for upon no other ground can it be accounted for, that the writ of right was never used. Indeed it is not to be accounted for, why the legislature should desire that the plaintiff should be barred of his ejectment, but at the same time be able to recover in a writ of right. What motive could they have? How would that have promoted the designs which influenced them in passing the act? Their design was to do away the obstacles which opposed the settlement of the country: These were the uncertainty and the perplexed situation of titles, and the expectation of heirs under former grants.—Was it promotive of this design, that the possession introduced by the act should not render the title complete to all purposes, but should leave the possession as much exposed to those heirs and their actions as before? and those who purchased under such possessions, no more certainty of an indefeasible title than before? I forbear to say any thing of the nature and form of a writ of right, and of those by whom it is to be used, and of other circumstances incident to it; it is sufficient, for my present purpose, to be enabled to discover no substantial reason for preferring a recovery under that writ, to a recovery in the action of ejectment, and until better informed, I shall take the liberty to believe, such a distinction could not have been intended for any purpose; and therefore that it was not intended at all. That a naked possession will operate the bar spoken of in the third and fourth clauses, is as unfounded as the rest of the position. The remarks already made upon the causes of passing the act, shew that it was made to settle disputes between claimants, under different grants for the same lands, and with that only view. This is the very reason why it never extended to the lords proprietors, so as to bar them by a naked possession of their lands: as it would have done, they being equally subjects with the settlers of the country, had it reached the case of disputes, arising upon possessions unaccompanied with deeds or grants, or naked possession. In the times preceding the act, none pretended to hold lands by possessions against a title by a deed or grant; nor was it conceived, that possession could either make or bar a title: how could it when no law existed for that purpose? The 21 *Jac.* 1 *cap.* 16, was not in force, nor indeed any statute made after the fourth year of his reign in the year 1607, that being the era of the settlement of the country legally authorised and continued: for want of such a property inherent in possession na-

turally; the act was passed to give it that property in certain instances, and under certain restrictions. Before this period, no disputes were known between claimants by grant, on the one hand, and bare possessions on the other. The law of those days rendered the grantee's title incontestible, where not opposed by an adverse naked possession; there was no danger in purchasing from such a grantee on account of the adverse possession, to be dreaded or apprehended: It is impossible in the nature of things, that the act could have for its object, any disputes of that nature, which had not then been known or heard of, nor were foreseen: the idea of title by naked possession arose after the act, and originated in a misconception of its meaning; and has become a new source of litigation, unknown to former times, and not anticipated by the framers of the act. The claiming of lands by a naked possession against a title by a deed or grant, which claim whenever made is grounded upon the act, and this mistaken idea has encouraged those having no title, colourable or otherwise, to settle upon the lands of others, and commit trespasses, with a view of acquiring a title by a continuation of such trespass for seven years together; and the same mistaken idea, has made men believe, that actions must be instituted against such trespassers, to prevent the acquisition of title; and thus an act, which breathes the spirit of peace and quietness, which flowed from the solicitude to prevent law-suits as far as possible, and to remove the causes which perplexed men's titles, has been made the disturber of repose, the mother of inquietude, the stirrer up of controversies, and a net to entangle men's titles. Instead of discountenancing attempts to get lands by unfair means, without purchasing from the lords proprietors, or from those who have purchased from them; instead of repressing any practice of settling upon the lands of an honest purchaser, knowing that the settler commits a trespass in doing so, and the land belongs to another, and not to himself; it is made to encourage and to cherish such attempts and practices. We may perceive the soundest policy and justice, in protecting the possessions and confirming the titles of those who have paid for their lands, obtained grants and deeds, and settled down upon them, and who have cleared, cultivated and improved them for seven years together, believing them to be their own; and who in all that time, have received no information from a prior grantee, or those standing in his place, or their better title; but we can perceive no motive for extending the same protection to a naked possessor or trespasser; a design of that kind is not to be inferred either from the nature of those controversies which existed prior to the act, the causes which gave birth to the act, or from any of the terms employed by it to signify its meaning, when compared to and explained by other parts; and therefore there is no ground to believe it to have actuated the makers in any degree: the

less so, as the immediate consequences of the doctrine, the incompetency of the ejectment; but the competency of the writ of right after the seven years, fabricate an arbitrary distinction, unfounded; when applied to our circumstances, in any principle of convenience, policy, or justice: for with respect to intention, why not recover in the ejectment after the seven years as well as in the writ of right? A distinction which has never been recognized by the practice of those who have gone before us, has never been found necessary to be admitted as a part of our law, prior to the year 1715, till the year 1799, during all which time the landed interests and rights of the people have been satisfactorily secured and protected, without the aid of the writ of right.

Innovations in law, like innovations in government, are dangerous experiments; since the extent of their influence cannot be foreseen. And it is now much to be doubted, since the act of 1778, *cap. 5*, whether, supposing a writ of right to be necessary, it can be deemed a part of the law of this state. From the foregoing remarks, admitting them to be just, it is to be collected, that the second section of the act of limitations regards irregular, invalid and informal conveyances made before the act passed; that the third and fourth sections relate to cases, where several persons have deeds or grants perfect enough in form for the same tract of land: and some of these persons under deeds or grants of a posterior date, take and continue the possession for a considerable length of time: and that the true meaning and operation of the latter clauses, are to confirm for ever the title of all such persons, having a colour of title, who remain in possession under such title, for seven years without entry or suit in law, except as against persons laboring under incapacities mentioned in the fourth clause, and as against them also, if they shall not sue within the time limited after such disabilities shall be removed, but not to create any title *de novo*, upon the ground of possession or otherwise.

*Borrets vs. Turner.*

**EJECTMENT.** The lords proprietors granted four hundred and forty acres to John Worley in the month of March, 1717; and he in November, 1724, conveyed one hundred acres, part thereof, to one Jones; and afterwards he conveyed the residue, being 340 acres, to his son Joshua, who died, leaving two sons, Joshua and William, and three daughters, Elizabeth, Louisa and Esther. Joshua entered and died without issue; then William entered and died without issue; and then the lands were divided amongst the daughters, and the hundred acres conveyed to Jones, were allotted to Esther. The Worleys possessed and cleared the tract of 340 acres for upwards of forty years, and extended their clearing into a part of the hundred

acres tract, and cultivated that part with the other, within the same fence, for the same time.

*Haywood, Justice.*—The plaintiff who purchased of Esther cannot recover, unless he shews a good title in himself. It is needless to enquire what title the defendant has. The hundred acres were separated from the residue, by a legal conveyance of the patentee; and the Worleys have no title, unless they acquired one by the possession they had of a part: A possession of part, is possession of the whole; but then a possession without colour of title, will not bar adverse claims; a possession with a colour of title for seven years, will bar them forever, and give a good title and right of property to the possessor.

Verdict and judgment accordingly.

*Trustees of the University vs. Dennis Sawyer.*

**EJECTMENT.** The land was formerly granted to a man who went away before the year 1771, and has never been since heard of. In 1780, part of the same land was granted by the state to another, whose title came to the defendant; and in 1788, another part was granted to another person, whose title came to the defendant. It was insisted for the defendant, that the state at the time of these grants, was entitled to the lands, either by escheat or confiscation: and having granted the same to those under whom the defendant claims, could not afterwards make a valid grant of the same lands to the University; and secondly, supposing the grants to those under whom the defendant claims, may be voidable; as having issued under a mistake, occasioned by a misrepresentation on the part of the grantees, of the state's title to them; they cannot be avoided in a writ of ejectment.

*Per curiam.* Moore and Haywood.—The officers authorised by the government to sell and convey vacant lands, which had never appropriated by any grant, have sold and conveyed lands which had been thus appropriated; they had no power for that purpose committed to them; and all such sales and all grants in consequence thereof, are therefore void. The court will not on a trial in ejectment, declare, that such grants shall be recalled and cancelled; but they are bound by the express words of the act of 1777, ch. 1, sec. 3 & 9, to say they transfer no title to the grantee.

Verdict and judgment accordingly for the trustees.

*Scott, an infant, per Guardian vs. M'Donald.*

**MOORE, Justice.**—This being an issue in an equity cause, the answer denying the bill, shall be given in evidence to the jury for the defendant. It is not conclusive, however, they may give to it only the credit it deserves.

*Haywood, Justice.*—It should not be given to them as evidence. Requiring the oath of the defendant, is not for the purpose of making evidence for himself, but in order to compel him to confess for the benefit of the complainant, what otherwise perhaps he could not prove.

*Vide* 3 Atk. 407. 1 E. Ca. 229, s. 13. 2 Vern. 554. Powell on Contracts, 291.

*Bryant vs. Stewart.*

**D**EBT upon a bond, to comply with an award to be made by certain arbitrators—plea no award.—Replication stating an award and breach—demurrer thereupon. The award by the condition of the bond, was to be delivered before the 29th of April; but there was a further writing indorsed, purporting that the award should be binding if made before the 7th of May.

*Moore, Judge.*—It should have been averred that the endorsement was made before the bond was delivered, otherwise it cannot be taken to be a part of the bond.

*Anonymous.*

**P**ER curiam.—This bond is executed by one partner for himself and the others; he had no power merely as a partner, to execute a bond for the rest of the partners, and it is not obligatory in the others. The former decisions in this country have been contrary to the present opinion of the court; but the authorities cited on the part of the defendant prove them to have been erroneous. The case in 7 Term Rep. cited by Mr. Brown is decisive.

Halifax, April Term, 1799.

ALFRED MOORE, <sup>Janis,</sup>  
JOHN HAYWOOD, <sup>all pers. &c.</sup>  
<sup>And th</sup>

<sup>Band to</sup>  
*Bryant vs. Christie.*

**EJECTMENT.** The land in dispute was a triangular piece and the question was, whether or not it was included within the bounds of Jeffries' patent, under whom the plaintiff claimed: If it be, the plaintiff is entitled to recover; if otherwise, not. Jeffries' patent begun on Fishing Creek, then east 320 poles, along Pollock's line to Pollock's corner, thence north to Bryant's, then along Bryant's line 320 poles to the creek. A north course from Pollock's corner, intersects Bryant's line, at the distance only of 130 instead of 320 poles from the creek, and at a point 190 poles from Bryant's corner. The plaintiff contended that from Pollock's corner to Bryant's, described a line from one corner to the other. The defendant, that the line described

in the patent being from Pollock's corner north could not be departed from; the words of the patent were as well satisfied should the line from Pollock's corner terminate at Bryant's line, as if it terminated at Bryant's corner. And his counsel cited the reported case of *Busten against Hill*, *Havwood's Reports*, 22, relative to the same land, where Judge *Williams* had so determined.

*Moore, Justice.*—There is parol evidence in this case, tending to prove, that there was an old marked line from Pollock's to Bryant's corner; and some ancient deeds are bounded by that line. The first settlers of this country risked their lives in coming to it, then a wilderness inhabited by savages, to take up lands, and to improve their circumstances; they were invited to do so by the lords proprietors, who sat at their ease at home and received the purchase money, and derived a revenue from the lands after they were sold; they appointed and continued in office, the persons who received entries, made the surveys and issued the grants; and they in justice were responsible for their mistakes. The settlers of the country had no share in the appointment, nor in any of the mistakes that happened.—If these officers wronged the lords proprietors, the blame is imputable to the lords proprietors themselves: if they wronged any purchaser by a mistake, that should be rectified, and ought not to prejudice him. The report states a number of cases in which mistakes have been rectified by juries, upon trials in ejectment, upon evidence of the mistake; and if these cases were law formerly, they are so now—and ought to prevail in the present as well as in any other case. I am of opinion, if the jury are satisfied the line really intended, was from one corner to the other, that they should find for the plaintiff, notwithstanding it is described in the patent as a line running north from Pollock's corner.

Verdict <sup>in</sup> <sup>favor</sup> of <sup>the</sup> <sup>plaintiff</sup> accordingly.

*NOTE.*—We should be cautious in starting from the words of a deed: but here it stood equally <sup>and</sup> <sup>at</sup> <sup>the</sup> <sup>face</sup> <sup>of</sup> <sup>the</sup> <sup>deed</sup>, whether to go a north course, or to <sup>before</sup> Bryant's corner; and that is such an ambiguity as may be explained in a deed.

*Young vs. Drew,*  
and

*Young vs. Harris.*

**EJECTMENT**—in which the plaintiff declared for the whole tract, and set up his title in the evidence to an undivided half.

*Moore, Judge.*—The plaintiff must be non-suited: he should have declared for an undivided moiety of the whole; otherwise the action of ejectment will be made to have the operation of a writ of partition; for the sheriff cannot put the plaintiff in pos-



session of the half he claims, not being stated to be an undivided half, unless he previously make a division and ascertain the moiety the plaintiff is to have. *Gaskin vs. Gaskin*, in Cowper, 657, is not like this case; for there one tenant in common recovered against another, the plaintiff was non-suited; and though he moved several times afterwards in this term to have the non-suit set aside, he did not prevail.

*Quere de hoc*, and see law of ejectment, 109. 1 Rolls. Ab. 386. 1 Sid. 229. 1 Burr. 326, 330. 2 Rolls. Ab. 704, p. 22. Cowp. 657. 2 Bl. Re. 973, 974, 975, 1012, 1013.

*Anonymous.*

**B**ILL of exchange drawn from this state, upon a person in Philadelphia, and protested for non-payment; but it had not the words for value received.

*Per curiam*—The act of 1797, ch. 22, will not apply to this bill, so as to entitle the holder to ten per cent. damages, for want of the words, for value received; it is governable by the rules of the common law.

*Knight vs. Knight.*

**B**ILL by a married woman for a separate maintenance, on account of the ill usage of the husband, and demurrer thereto, for that it was not brought by her *prochein amie*.

*Plummer* for the plaintiff, said, it had been the practice in this court to institute such suits without a *prochein amie*; and he cited two precedents, *Hunter vs. Hunter* and *Borrow vs. Barrow*. He said, in England, in some cases, a *prochein amie* had been required, in order that he might answer the costs; but even there, the practice had varied, and in some instances, the wife had sued without one. The same reason for requiring a *prochein amie* did not exist in this state, since the act of Assembly making it necessary for all persons to give security for costs before process can issue; and that such security had been actually given in the present case, and to shew that the practice in England had been both ways, he cited 1 E. Ca. 67, which cites 1 Ch. C. 4 & C. 4.

Thereupon the court, *Moore* and *Haywood*, over-ruled the demurrer, and ordered that the defendant answer.

*Ingles vs. Donaldson.*

**T**HIS cause coming on again, and the same evidence given as before, *Moore*, Judge, was of opinion the transaction was fraudulent and void, and *Ingles* recovered:

*Hamilton vs. Mary Williams.*

**T**HIS case now coming on, *Moore*, Judge, was of opinion that the witness was incompetent.

*Barry vs. Ingles and others.*

**ACTION** for assault and battery.

*Et per Moore, Judge.*—Any immediate provocation given to the defendants may be shewn in evidence to mitigate damages; but any remote provocation shall not, for then we should have to go into quarrels and disputes that existed perhaps for years before the fighting: such should not be considered as stimulating the defendants to fall upon the plaintiff at so late a period, after there was time for the passions to cool and for the parties to reflect.

*Fetts and Wife vs. Mary Foster and William Thomas.*

**THE** plaintiffs were entitled by the will of Foster, deceased, to a considerable part of the property he left, upon the marriage of the defendant, Mary. The bill stated that she was married to the other defendant, which they in their answer denied.

*Moore, Judge.*—The answer of the defendants is evidence for them—and as such, shall be read to the jury: but it is not conclusive evidence; there is no positive proof of a marriage, but there are circumstances which tend that way; they have lived together a long time as man and wife; have had several children; and she was as the witnesses say, a woman of good character before these transactions—whence it is presumable, she would not have associated with the other defendant as she has done, unless there had been a marriage. I am of opinion, that upon such evidence, the jury may find a marriage.—And they did so.

*Vide 3 Atk. 407. 1 E. C. A. 229, s. 13.*

*Greer vs. Blackledge.*

**BLACKLEDGE** assigned a bond for money to Greer, who sued the obligors, and took them in execution, and they took the benefit of the insolvent debtors act, and were discharged.

*Moore, Judge.*—That is no satisfaction of the debt, and the plaintiff is entitled to recover notwithstanding.

Verdict and Judgment accordingly.

*Butts vs. Drake.*

**EJECTMENT.** The jury retired and found a verdict; but whilst they were out the court adjourned, and they separated without delivering their verdict to one of the Judges; but delivered it next morning in court, and it was entered *de bene esse*: And after some days consideration, *Moore, Judge*, decided that it was a good verdict notwithstanding the objection, that it should have been delivered to a Judge before the jury separated.

*Anonymous.*

**MOORE**, Judge. This is an action brought by a British creditor, under the treaty of peace, for a debt contracted in this state before the war, which debt was effectually confiscated by a sovereign power, having a right to make the confiscation.—A treaty has not the omnipotence attributed to it—that of taking a debt from the state which lawfully belongs to it; or that of re-charging a debtor who has actually paid into the treasury under the existing laws, and has procured a discharge agreeably to them before the treaty.—And I would not now suffer such suitors to recover, but for the consideration that they may recover by suing in the Federal court. As to the interest I am very clear it ought not to be allowed, but from the time the debt was demanded after the treaty; these creditors did not return till long after the war, most of them kept the bonds in their possession beyond sea, so that the debtor could not pay.

**Haywood**, Judge. I am of the same opinion now, I was of at the last term—that these debts are recoverable by the law of the country, and for the reasons I then gave: as to the interest, I agree: The debtor is not bound to seek his creditor beyond sea; but then it should be disclosed by plea that the creditor was beyond sea; and further, that the debtor has always been ready, since the ratification of the treaty to pay, and is now ready; and he should pay the money into court in verification of the latter part of the plea: How else are we to know the creditor was beyond sea? Or how has the creditor an opportunity of shewing where he was and when he returned, unless by replying to the plea of the defendant? The omitting to make such plea, and to give such opportunity, amounts as in all other cases, to an admission on the part of the defendant that no such fact exists. Interest is to be paid in all cases of bonds, unless where by a general law, or for some general reason it is suspended for a time; as during the time of our war, or unless the defendant by a plea of tender properly pleaded, will shew, that in justice he ought not to pay it.

So it was adjourned, as also were several other cases in the same predicament.

Wilmington, May Term, 1799.

ALFRED MOORE, }  
JOHN HAYWOOD, } *Judges.*

— vs. *Ashe.*

**EJECTMENT.** Walker had sold the land to the plaintiff's father, and had given bond to execute a title at a future day, and the father by deed declared that these lands were purchased

for the plaintiff, &c. In the time of the late war, the commissioners of the confiscated property, sold the land as a part of the estate of the father to the defendant, who took possession in 1786, and continued that possession to the present time: his grant from the state was procured about two years ago, and in 1798, a short time before the institution of this action, Walker executed a deed to the plaintiff.

*Haywood, Judge.*—The defendant has had a seven years possession, but without any colour of title for a great part of the time, and therefore his possession will avail him nothing: But then Walker executed this deed to the plaintiff, when the defendant was in possession, claiming the land adversely, and Walker had no means to recover the possession but by action; and therefore could not legally execute a deed so as to transfer his right of entry to the plaintiff.

Verdict and judgment for the defendant.

*Burgwyn vs. ———*

ONE of several partners drew a bill of exchange, subscribed with the name of the company; which bill came by endorsement to the plaintiff, and he sued the administrator of one of the partners, there being another partner still alive. It was objected that he ought to have sued the survivor; to which it was answered, that should have been pleaded in abatement: and for this was cited *Rice vs. Shate*, 5 Burr. 2611.

*Per curiam.*—The objection may be now taken, and it is fatal: Where there are two partners and one only is sued, he may say, you contracted also with another, who by the contract is bound with me to contribute to the performance of it: but then we decide, and the whole debt survives against the other, and the executors of the deceased are not liable at all, you cannot make them so by suing them; then shewing in evidence that there is a surviving partner, proves them not liable to the contract, and consequently not to a recovery in the action.

*Trustees of the University vs. ———*

*PER curiam.*—A devise of lands to an alien, is void.—These lands could not have been confiscated as belonging by devise to the alien; the deviser died without heir; the devise operated nothing; the lands therefore escheated, and the Trustees are entitled to recover.

Verdict and judgment accordingly.

*Anonymous.*

THIS was a collateral issue, made up by the direction of the court, between the heir and administrator—in which the question was, whether the administrator had fully administered. Amongst other things, he offered an account, stating a charge

for this trouble and services, in doing the duties of an administrator.

*Haywood, Judge.*—By 1782, ch. 23, sec. 2, the administrator shall retain in his hands no more of the deceased's estate than amounts to his necessary charges and disbursements, and such debts as he may legally pay within two years after the administration granted: he cannot, therefore, be allowed for any thing but actual expenditures; not for loss of time or personal services.

*Vide 3 P. W. 249. 2 E. C. A. 454, sec. 10.*

*State vs. Hall.*

**H**E was indicted for stealing a male slave, the property of the prosecutor, against the form of the act of Assembly; and he was found guilty as charged.—Whereupon, *Badger* and *Jocelin* moved an arrest of judgment; for that the indictment did not state the stealing to have been with an intention to sell or dispose of to another, nor with an intention to appropriate to his own use. The words of the act are, “That any person or persons who shall hereafter steal, or shall by violence, seduction, or any other means, take or convey away any slave or slaves, the property of another, with an intention to sell or dispose of to another, or to appropriate to their own use, such slave or slaves, and being thereof legally convicted; or shall upon his arraignment, peremptorily challenge more than thirty-five jurors; or shall stand mute, shall be adjudged guilty of felony, and shall suffer death without benefit of clergy.” They said there was no such thing at the common law as the stealing of a slave; not only because it did not recognize slavery, but also because larceny can be but of inanimate or irrational subjects: whereas a slave possesses the faculty of reasoning and the power of volition like other men. If carried away with his consent, it is seduction; if otherwise, he can declare his owner and be restored to him: he is not in his nature, capable like those things which are the subjects of larceny, of being concealed forever from his owners: he was not a subject of theft by the Roman law, nor by the law of any country where slavery has been tolerated; nor could a villain be stolen by the common law. Then the stealing of a slave is not now felony in this state, unless done under all the circumstances mentioned in the act, and that contains a circumstance not stated in the indictment. The Judges of a free country are bound to decide upon penal laws, especially those of the capital kind, according to the letter; they may perhaps be governed by the spirit so far as to restrain their operation in cases falling within the letter, but evidently not within the meaning, but not to extend the meaning beyond the letter, to bring a case by construction under the punishment of the act, which is not within its letter. This rule is indispensable to the safety of every citizen; it protects him in the enjoy-

ment of his life, against every possible attempt to condemn him, under the pretence that he has offended against the meaning of a penal law; which meaning were construction permitted in such cases, may be amplified at pleasure: therefore, where the third of H. 7, ch. 2, enacted, "that if any person shall for lucre, take any woman, &c. and afterwards she be married to such misdoer, &c. that he should be capitally punished:" though the taking for lucre seems not to be a circumstance to enhance the offence, yet the indictment must state that circumstance; for, says the book, such are the words of the Statute, 4 Bl. C. 208.—If a statute enact that those who are convicted of stealing horses, shall be capitally punished, he shall not be thus punished who is convicted of stealing but one horse; 1 Bl. C. 88. If a statute make the stealing of sheep or other cattle to be a capital offence, the Judges shall not say what animals are meant to be included under the words, other cattle; 1 Bl. C. 88, so strict is the rule. Then with respect to the act of Assembly, the word "steal" must be connected with and govern the words "slave or slaves, the property of another," as well as the words "take and carry away," otherwise the fact of stealing no matter what will be a capital felony; and as the words "with intention," &c. immediately follow in continuation of the sentence, before any new subject is taken up, without any disjunctive particle, in the same breath, and so as to complete the sense of the speaker, they are by all the rules of syntax, concomitant upon them, equally when governed by the verb "steal" as when governed by the verbs "take and carry away;" and then *reddendo singula singulis*, the act stands thus:| "That any person or persons who shall hereafter steal any slave or slaves, the property of another, with intention to sell or dispose of to another, or appropriate to their own use, such slave or slaves; and that any person or persons who shall by violence," &c. and thus the fact charged in the indictment is not the same fact with all its circumstances as is specified in the act; and being not guilty within the act, he is not guilty of any felony, and the judgment should be arrested.

*Moore, Judge.*—No rule of the common law expressly decides that the stealing of a slave is larceny, but there is a rule which says, the stealing the personal goods of another, with a felonious intent, is larceny; and a slave is the personal chattel of his owner: the rule protects every species of personal property, though not known as a subject of property when the law was found. With regard to the act of Assembly, it was passed in turbulent times, when it had become a practice to carry away slaves under pretence that they belonged to the public as confiscated, or were owned by disaffected persons or the like; they were sometimes carried off privately and by stealth; at other times openly and by violence: the word "steal" reaches the former case; the words next following, repress the mischief of

a carrying away by open force, or by persuasion or other means than by stealth, but nevertheless with an intention to appropriate to his own use: the word "steal" *ex vi termini*, includes an intention to appropriate to his own use, or to sell or dispose of to another, and therefore the intention expressed in the act, if applied to the case of stealing, is useless and redundant. The offence meant by the legislature, is completely described without them by the word "steal," but with respect to the latter branch, the taking and carrying away by violence, &c. do not necessarily import the intention mentioned in the act, and is not so detrimental and injurious as when accompanied by that intention: in that part of the act, the intention is a principal ingredient of the offence, and to that it is applicable, and not to the other; and I am of opinion not to arrest the judgment.

*Haywood*, Judge, concurred in opinion not to arrest judgment.

*Quere*—As the indictment concluded against the form of the act, whether it were good as an indictment at the common law; and whether in all events he was not entitled to clergy; which is not taken away unless the indictment state every circumstance as attendant on the fact, that the act itself states and brings the prisoner within the very letter. 2.H. H. P. C. 336, 344. *Dyer*, 183. 1 Bl. C. 88.

## Halifax, October Term, 1799.

JOHN LOUIS TAYLOR, } *Judges*  
JOHN HAYWOOD, }

### *Plummer vs. Christmas.*

**C**HRISTMASS; about five years before the institution of this action, assigned a bond to Plummer, wherein Willis was the obligor. The debt secured by this bond, was further secured by a mortgage on a tract of land.

*Per curiam*:—Where a negotiable paper is assigned as a bill of exchange or the like, that transaction is regulated by the law of merchants; and by that law the assignee must apply in a reasonable time for payment; and if payment be refused or delayed, notice thereof must be given in reasonable time; and in failure of a compliance with these conditions, the assignee cannot in general maintain his action. He cannot maintain it in any case, unless he shews the drawee had not any of the effects of the drawer in his possession. But in case of unnegotiable papers actually assigned, the law is otherwise, being constructed upon principles of natural justice and equity. The holder of the paper must apply in reasonable time and give notice of non-payment in reasonable time; and in failure thereof, if a loss of

the debt actually happens, the holder of the paper shall bear it : justice requiring that he by whose negligence a loss has happened, shall suffer by it ; but if no loss has actually happened, the assignee may recover the debt of the assignor, although he has not given notice of non-payment in reasonable time. He may return the paper when he cannot procure the obligor to pay it. Here is no loss of the debt, which must fall either upon one or the other : for though Willis, the obligor, is insolvent, yet Christmas, the assignee, is safe by means of the mortgage.

Verdict and judgment for the plaintiff.

*Gilmour vs. the Administrators of Kay, and the Trustees of the University.*

**PER curiam.**—Kay purchased of Black, the lots and small tract of land in question ; and Black had previously purchased of Gilmour, who all along retained the legal title, and yet retains it. A decree of this court directed Gilmour to convey to Kay, upon Kay's paying the balance of the purchase money to Black's administrator ; but before this decree was executed, Kay died and devised the premises to his sisters residing in Great-Britain.—We are of opinion they cannot take by this devise, being aliens ; and that the equitable estate which Kay had, vested by his death in the trustees of the University.—The word *escheat*, as used in our act of Assembly, embraces every case of property falling to the sovereign power for want of an owner.

*Smith vs. Weaver.*

**PER curiam.**—If an action of trespass be brought for killing a negro slave, pending an indictment for the same fact, and the indictment be first tried and the defendant acquitted of the felony, that proves the trespass never was merged ; and the plaintiff may proceed to try his action, notwithstanding the objection that trespass cannot be commenced till after a trial for the felony.

*Corbin and others vs. Waller and others.*

**PER curiam.**—The executor, who is one of the defendants, procured an order from the county court of Warren, to sell the slaves of the testator for the purpose of making a division amongst the legatees, there being five negroes and six legatees : the jury have found that this sale was conducted fairly. The executor himself purchased four of the negroes for less than their value. Had the sale been for the purpose of raising money to pay debts, there is no doubt but the purchase by the executor would be void. The general rule is, that a person entrusted by the law to sell, shall not be a purchaser : the rule is



so formed to prevent the frauds which a want of the rule would give birth to. It seems to us, the sale in the present case, is within the reason of this rule; but we will take time to consider of it. It has been often determined, that the rule extends to sheriff's selling by execution, who cannot purchase under any form at such sales made by themselves; and to executors selling to raise money for the payment of debts.

*State vs. Knight.*

**H**E was indicted of passing counterfeit bills of credit, of the likeness of the genuine bills of credit of this state, in Virginia.—The indictment was drawn upon the act of 1784, ch. 25, sec. 4: and whereas there is reason to apprehend that wicked and ill disposed persons resident in the neighboring states, make a practice of counterfeiting the current bills of credit of this state; and by themselves or emissaries, utter or vend the same with an intention to defraud the citizens of this state: Be it therefore enacted, that all such persons shall be subject to the same mode of trial, and on conviction, liable to the same pains and penalties as if the offence had been committed within the limits of this state, and be prosecuted in the superior court of any district within this state.—And he was convicted.

*Per curiam.*—This state cannot declare that an act done in Virginia by a citizen of Virginia, shall be criminal and punishable in this state: our penal laws can only extend to the limits of this state, except as to our own citizens: but granting that our legislature could enact laws for the punishment of offences committed in Virginia, still this clause only extends by implication to acts done in Virginia; and no penal law can be construed by implication nor otherwise than by the express letter.

He was discharged.

Wilmington, November Term, 1799.

JOHN LOUIS TAYLOR, } Judges.  
JOHN HAYWOOD, }

*Blake and Green vs. Wheaton.*

**W**HEATON and his partner drew a note payable to Wheaton or order, who endorsed to the plaintiffs.—There was a verdict for the plaintiffs, and a motion in arrest of judgment; and upon argument, Mr. Jocelyn insisted that while the note was in the hands of Wheaton, no action could be maintained upon it; he being one of the payors as well as the payee, he could not sue himself, nor could he sue another alone; and as

he had no right of action himself, he could not transfer such right to another.

*Per curiam.* We may consider this paper as an authority or power given by both partners to Wheaton, to draw on the partnership effects in favor of some third person; and as an engagement of the partners, that it shall be paid, which is an acceptance; and then it is an order drawn by Wheaton and accepted by himself and partner in favor of the plaintiffs, which is a valid contract. It is not unusual for partners to draw, payable to themselves or their order; 2 Doug. 653: and for one or both to endorse to some third person, then why not two promise to pay to the order of one?

Judgment for the plaintiffs.

*Anonymous.*

*SCI. fa.* to revive a judgment, to which the defendant pleaded that he had been formerly arrested for the same debt on *a. ca. sa.*

*Foxclyn* for the plaintiff, cited 1 Show. 174. 1 Salk. 271. Barnes, 373. 4 Burr. 24, 83. 2 Mo. 136.

*Per curiam.*—The single fact of having been arrested on *a. ca. sa.* without saying that he was discharged from custody by consent of the plaintiff, will not discharge the judgment, for he might have escaped, or have been discharged by the officer; and as the plea has not stated how he came out of custody, the presumption is, that he obtained release by such means as would not discharge the judgment.

Judgment for the plaintiff.

Edenton, April Term, 1800.

*Ballentine and others vs. Poyner and wife.*

**T**HIS was an action in the county court, for waste, and a verdict and judgment thereupon, and a writ of error wherein general errors were assigned; and amongst others, *Slade* relied upon the following:

First—That the county court had not jurisdiction. Secondly—An action of waste will not lie in this country: what is waste in England, cannot be so considered here, and there is no act of Assembly to define what waste is. Thirdly—A view is incident to the action of waste—and here it does not appear upon the record, that the jury had a view of the place said to be wasted; and notwithstanding this defect, there is a verdict and judgment.

*Per curiam.* HAYWOOD, Judge—The words of the act of 1777, ch. 2, sec. 61, are, "That the county courts shall have

“jurisdiction of all causes whatsoever at the common law, within their respective counties, where the debt, damages, or cause of action, is above twenty pounds, except certain cases within which the action of waste is not.” And even as to these excepted cases, many of them are now under the jurisdiction by subsequent acts. Secondly—It is true some difficulty may arise in precisely determining what shall be taken to be waste; but that is no argument to prove that an action of waste will not lie: There are many things all men would agree to be waste; though there are others which might divide opinions. Suppose a widow pulls down valuable buildings in order to sell the timber, or to erect new buildings with the materials upon another tract of land; would it not be a great defect in the law were she not punishable in an action of waste for this? I would define waste thus: an unnecessary cutting down and disposing of timber, or destruction thereof upon wood lands, where there is already sufficient cleared land for the widow to cultivate, and over and above what is necessary to be used for fuel, fences, plantation utensils and the like: but if it respects juniper swamp, and other lands similarly circumstanced, where the timber made into staves and shingles, is the only use to be made of the lands, then the devisee or widow shall not be liable to waste for using such timber, according to the ordinary use made of the same in that part of the country. As to the third objection, a view at the common law was not only incident to the action, but necessarily to be observed therein. This, however, is altered by 4 and 5 Ann, 616, where the court is directed to order a view in such cases where to them it shall seem necessary.

Judgment for the plaintiff.

*Bryer's Executors vs. Stewart.*

**D**EBT; and upon oyer craved and had, the defendant pleaded *non est factum*, and no award made. The plaintiff replied an award, setting it forth, and stating it to have been made before the 8th of May, and assigned a breach in not paying, &c. issue was joined upon the breach, and as to the award itself, there was a demurrer and joinder, which now came on to be argued. The condition of the bond was, that the defendant would stand to, abide by, and perform the award of the arbitrators, if the same should be made before the 30th of April; but the defendant afterwards endorsed words, purporting that he would perform the award if delivered before the 8th of May: and it was now insisted by the defendant's counsel, that this endorsement being not under seal, and having been made after the delivery of the bond, was no part thereof; and therefore that the award being not delivered before the 30th of April, was not binding on the defendant: and he cited 3 Term, 592; where a parol agreement to enlarge the term of building a house, stipu-

lated in a deed of covenants, was not allowed of; and therefore the notes is stated another case, where the time for making an award being enlarged; not saying whether by parol or how otherwise, was not allowed.

*Econtra*, were cited Mod. Entries 254, and 6 Mo. 237.

And by the court, after two days taken to consider:—The question is, whether the endorsement be part of the bond—for if it be, then an award made within the time limited by the endorsement, will be good. I agree with those who say that to be a part of the deed the indorsement must be made before the delivery thereof: but then if a deed be delivered and fail of its effect, and the terms of it be to be altered, and such alteration be accordingly made, it is no longer the old contract, but a new one; and in order to effectuate the new contract, the deed containing the same, must be delivered. The case in Cowper, where husband and wife mortgaged the lands of the wife, and after the death of the husband, she wrote to the tenants to pay rent to the mortgagee; this was construed to be a new delivery, because tantamount to a new assent to the contract, is in my opinion, decisive of the present: for if that act amounted to a new delivery where the widow never had the deed in her hands, how much more will the circumstances in this case amount to a delivery when the deed actually was in the defendant's hands, and the endorsement signed by him, and the whole paper redelivered to the obligee? This made it to be a new deed *in toto*; and consequently the endorsement being before the latter delivery, is a part of the deed—and an award made before the 8th of May, is good.

Judgment for the plaintiff.

*Burnside vs. Green, Administrator, &c.*

versus

*Witherspoon, Administrator of Nash.*

**PLAINTIFFS** in these causes had obtained judgments without any pleas on the part of the defendants denying their having assets: and an execution had issued in the first instance, commanding the sheriff to levy the debt *de bonis testatoris si, &c. et si non, then de bonis propriis*: And Judge Taylor, on the complaint of the defendants, had issued a *supersedeas*. And now Woods argued, that there is not any book which warrants so speedy a proceeding. Even Pettifer's case, reported by Lord Coke, and adverted to by Wentworth, page 116, will not permit a *fi. fa.* to be levied *de bonis propriis*, until a return of *nulla bona*. And as to the cases in this state, Haywood's Reports, 218, 298, go no farther than to warrant a special *fi. fa.* after *nulla bona* returned to a general one. Cases may happen where even that mode will be found subject to inconvenience: for suppose after

judgment, the personal chattel which the executor relied on for satisfying the plaintiff's demand, should perish before the execution satisfied; the sheriff would return *nulla bona*, and a special *fi. fa.* would immediately issue without giving to the defendant any opportunity to discharge himself by shewing the destruction of his assets. I should therefore contend, were it not for Pettifer's case, and the strong intimation given in the cases decided in this state, that a *scire facias* should go; for there must be a new judgment to support this special *fi. fa.*—The first judgment will not, for that is to be levied *de bonis testatoris*, and the damages *de bonis propriis*: and surely it is a little out of the common course to give a new judgment in the absence of the defendant, upon the mere return of *nulla bona*, that it should be levied *de bonis propriis*. However, what I wish to establish at present, is, that a special *fi. fa.* shall not issue until there be a return of *nulla bona*; he cited Impey, 466.

*Per curiam*.—The special *fi. fa.* ought not to issue till that return: We will adhere to precedents even where they confine us to narrower limits than the reason of them requires.

*Whitehurst vs. Davis.*

**T**HIS was a *Caveat*. It had been tried by a jury on the premises, who had given a verdict, which the county court had confirmed. A writ of error was brought, and the error assigned was, that it had been tried by 13 jurors. *Cro. C.* 414, and *Trials Per Pais*, 70, were cited.

*Per curiam*.—Our constitution declares, that in all controversies at law respecting property, the ancient mode of trial by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. It may be said, if 13 concur in a verdict, 12 must necessarily have given their assent. But any innovation amounting in the least degree to a departure from the ancient mode, may cause a departure in other instances, and in the end, endanger or pervert this excellent institution from its usual course: therefore no such innovation should be permitted.

The judgment was reversed and a new trial ordered.

*Borrets vs. Turner.*

**T**HIS was an ejectment for 100 acres of land in the county of Tyrrell. The lords proprietors granted 440 acres to John Worsley in 1724: he died in 1740, devising his lands to his son Joshua: he died, leaving two sons, Joshua and William, and three daughters, Esther, Elizabeth and Lavinia. Joshua, the grandson, died; and then William died; and the lands were divided amongst the three daughters. The part in question being 100 acres, was allotted to Esther, January, 1792. In 1794,

she conveyed to the plaintiff. On the 30th of April, 1725, John Worsley conveyed 100 acres to one Jones; and on the 4th of March, 1729, he conveyed 340 acres to Joshua, describing it as bounded to the westward by the lands in the possession of Jacob Blount, who then possessed the 100 acres now in dispute. In the year 1770, M'Kie took possession of a tract of land called Cooper's, adjoining to this 100 acres, and claimed both the 100 acres and Cooper's tract; and extended the clearing of Cooper's tract into and over a part of this 100 acres. About 30 years ago, M'Kie ran the line along the edge of the plantation of Worsley, within the 340 acres. There was an execution against Moseley, who then possessed the 100 acres, and M'Kie purchased it.

*Per curiam.*—Much has been said in the argument about the act of limitation: That has two clauses—the first regards possession under irregular and informal conveyances made before the passing of that act, and confirms the title where there either had been a possession for seven years, or where there had been a possession for part of seven years, which should be completed after the act; the other regarded future possessions and titles, and meant to establish the title of a subsequent patentee or bargainee of a patentee, who should take and keep an undisturbed possession of seven years under such latter title. But it ripens no possession into title which is not accompanied with a colour of title. It is true, as argued, that possession of part, is possession of the whole: but this applies only where two patents cover in part the same tract of land, the one lapping over upon the other; and both claimants are in possession of that part covered by his patent, and not covered by the other patent. He who has the elder title, is then in the legal possession of the whole land within his patent, as well that covered by the other patent as that which is not: but if one of the patentees actually sits down upon the part covered by both patents, and is in possession thereof seven years, the legal possession is his, not the other's; and the act of limitations will in such case complete his title, though the weaker one before: this must be however, an actual possession taken and kept by himself in person, his tenants, slaves or agents; and it must be a continued possession for the whole seven years. If in the present case, the 100 acres in dispute was severed by the conveyance of the patentee from the 340 acres, his possession of part of the 340, extended no further than to the dividing line between the 340 and the 100 acres severed from it; nor could it ever extend into the 100 acres so as to ripen into title, unless he by some other conveyance, devise or the like, regained a colourable title thereto. 40 years possession of the 340 acres, could not give a title to the 100 acre tract.

Verdict and judgment for the defendant.

*Anonymous.*

**PER curiam.**—The balance upon this debt as found by the verdict of the jury, is a sum under £. 20. It has been brought into this court by an appeal from the county court where it commenced. A part of the act of 1786, ch. 14, sec. 7, is in these words: "Provided, that no suit shall be commenced in the first instance returnable to any court for any sum under £. 20." Articles were delivered to the plaintiff and charged by the defendant; for the delivery of which there was no stipulation in the bond, which was for money; and the jury allowed them: and the presumption is, that they allowed them as set offs. Then the rule is, that if a larger sum is reduced by payments under £. 20, the court will order a non-suit, upon a verdict, ascertaining the sum to be under £. 20; because plaintiff knowing of these, should have credit given for them, and consequently must have known the amount of the balance: but if only reduced by set offs, the court will not order a nonsuit, because plaintiff could not know at the time of bringing his action, whether the defendant would set off or not.

Judgment for the plaintiff.

*Den on the demise of Penelope Swann vs. Peter Mercer.*

**EJECTMENT**—and a special case made for the opinion of the court, which was in substance this: That John Swann died seized in fee of the lands in question, leaving an half sister on the mother's side, a son, and a widow, the now plaintiff the mother of that son. The premises descended to the son from the father; and then the son died on the 11th of April, 1796. The question is, whether the mother be entitled to any and what estate in the lands.

After a lengthy and very able argument on both sides, the court gave judgment as follows:

**Haywood, Judge.**—It is very true as has been argued, that there is no necessity on the present occasion, to enquire into the defendant's title; for if the plaintiff be not entitled to the possession, there must be judgment for the defendant: yet for the satisfaction of the parties and the by-standers, I will make some remarks also upon the defendant's title, and consider this case in three different points of view. First—supposing John Swann had died, not leaving a son: Secondly—supposing the son had died, not leaving a mother: Thirdly—what obstacle the mother can oppose to the descent on the sister of the half blood on the mother's side.

First, then, had John Swan died, leaving the defendant his half sister on the mother's side, and no child, the case would have been under the government of 1784, ch. 22, sec. 3, "If any person dying intestate, seized or possessed of any estate

"or inheritance in land or other real estate in fee simple, and  
 "without issue, such estate or inheritance shall descend to his  
 "or her brothers or sisters, as well those of half blood as those of  
 "whole blood, to be divided amongst them equally, share and  
 "share alike as tenants in common," &c.

Secondly—Had the son died, leaving no mother alive, but the  
 defendant, the half sister of his father by the mother's side, and  
 without a child, the half sister in that case would have been en-  
 titled under 1784, ch. 22, sec. 4: "The same rules of descent  
 "shall be observed when the collaterals are further removed,  
 "than the children of brothers and sisters."—What rules of de-  
 scent? Why that the half blood shall take equally with the  
 whole blood under the restrictions mentioned in the proviso of  
 the third clause, "Provided always, that when the estate shall  
 "have descended on the part of the father, and the issue to whom  
 "such inheritance shall have descended, shall die without issue,  
 "male or female, but having brothers and sisters of the pater-  
 "nal side of the half blood, and brothers or sisters of the ma-  
 "ternal line also of the half blood, such brothers and sisters re-  
 "spectively of the paternal line, shall inherit in the same manner  
 "as brothers and sisters of the whole blood, until such paternal  
 "line is exhausted of the half blood; and the same rule of de-  
 "scend and inheritance shall prevail amongst the half blood of  
 "the maternal line under similar circumstances to the exclusion  
 "of the paternal line," &c. The half blood on the mother's  
 side is excluded no longer than there is some of the whole or  
 half blood on the father's side, and by the letter of the act, no  
 longer than there is half blood on the father's side. If there-  
 fore, there is neither whole nor half blood on the father's side,  
 the half blood on the mother's side will take in the same manner  
 as if there were no half blood on the father's side. Here the  
 collaterals are further removed than to brother's and sister's  
 children and the half blood; namely, the aunt of the half blood  
 on the mother's side will succeed in the same manner as brothers  
 and sisters, and their children succeed to a deceased brother—  
 that is to say, the half blood equally with the whole blood, and  
 the half blood alone where there is none of the whole blood.—  
 And as the defendant in this view of the case would have been  
 entitled had there been no mother; the third question is, can  
 the mother oppose any obstacle to the descent on the half sister  
 of the father? For if she cannot, the half sister remains entitled.  
 This question must be decided on the act of 1784, ch. 22, sec. 7,  
 and the amending clause in the act 2d, 1784, ch. 10, sec. 3; the  
 first of them in these words: "Whereas by the law of descents  
 "as it now stands, when any person seized of a real estate in fee  
 "simple, dies intestate without issue, and not having any bro-  
 "ther or sister, such estate descends to some collateral relation,  
 "notwithstanding that the intestate may have parents living; a



"doctrine grounded upon a maxim of law, not founded in rea-  
 "son, and often iniquitous in its consequences: Be it therefore  
 "enacted, that in case of any person dying intestate, possessed  
 "of an estate of inheritance without leaving any issue, and not  
 "having any brother or sister, or the lawful issue of such who  
 "shall survive, the estate of such intestate shall be vested in fee  
 "simple in his or her parent *from whom the same was derived*;  
 "or if such estate was *actually purchased or otherwise acquired*  
 "by such intestate, then the same shall be vested in the father  
 "of such intestate if living; but if dead, then in the mother of  
 "such intestate and her heirs; and if the mother of the intestate  
 "should be dead, then in the heirs of such on the part of the fa-  
 "ther; and for want of heirs on the part of the father, then to  
 "the heirs of the intestate on the part of the mother.—The lat-  
 "ter act is in these words: And whereas by the seventh section  
 "of the said act, real estates actually purchased or otherwise  
 "acquired, are to descend to the father if living; but if dead,  
 "then to the mother of such intestate and her heirs, by which  
 "the descent may be altered by the accident of death; and the  
 "paternal line which is favored in all other instances, may be  
 "deprived of the inheritance by such accident: Be it enacted, that  
 "in case of the death of any person intestate, leaving any real estate  
 "actually purchased or otherwise acquired, and not having any  
 "heirs of his body nor any brother or sister, or the lawful issue  
 "of such, then such estate shall be vested in the father of such  
 "intestate if living; but if dead, then in the mother for life; and  
 "after the death of the mother, then in the heirs of such intes-  
 "tate on the part of the father; and for want of heirs on the  
 "part of the father, then in the heirs of the intestate on the part  
 "the mother forever." These, if any, are the clauses which  
 support the claim of the mother. She was not entitled as the  
 law stood before these acts; and if she be not entitled under  
 them, her claim is unfounded; and the case is then just the  
 same as if the child had not left a mother; in which case the fa-  
 ther's sister of the half blood on the mother's side succeeds.—  
 Now the preamble to the seventh section of the first act states  
 the old rule excluding parents in favor of collaterals to be *often*  
 not *always* iniquitous in its consequences, from whence it is to  
 be inferred that it was not the intention of the legislature to make  
 the parents capable of succeeding to their children in all cases of  
 a child's dying without children and without brothers and sis-  
 ters, but in some cases only. These cases the act goes on to  
 describe.

The first of them is where the child has *derived* his estate  
 from the parent, that parent shall succeed. This necessarily  
 means a derivation from the parent by some deed executed: it  
 cannot mean a derivation by descent or devise; for in either of  
 these cases, the parent must be dead before the estate vests in

the child ;—whereas the act supposes the parent will be alive at the death of the child. In the case before us, the lands came by descent to the child from the father.

The second of them is where the child actually purchased the estate ; and that is not the case before us.

The third of them is where the child otherwise acquired the estate.

These words cannot include the two former cases, for then the specifying the two former were useless. It is intended to express some case different from these. They do not mean to comprehend the case where lands have descended from a parent to a child, because the 7th clause of the first act speaks of such an acquisition as either parent may possibly be alive to take, "it shall go to the father if living, and his heirs ; but if dead, to the mother and her heirs ;" tantamount to saying, if both parents be alive, the father shall take ; but if the father be dead, the mother shall take. How then will this idea comport with the other of the estate having come from a parent by descent ? Suppose the estate descended from the father, he must necessarily be dead, though the act contemplates a case where he may possibly be living. Suppose the estate descended from the mother ; then if the father be dead, she must be so also, and yet the act supposes she may be alive to take. The words " otherwise acquired " probably do not mean to include an acquisition by descent, because the third clause of the latter act says, if the father be alive, he is to succeed and his heirs after him : so that if the act means to comprehend the case of a descent, then an estate descended to the child from the mother, will be included. Then suppose the child die ; the father's family inherits. Suppose the estate descended from the father, his family also inherits, leaving no chance for the mother's family in any event to succeed either to an estate coming from the father or from the mother, but making the father's family in every event to succeed to the mother's estate. No reason can be assigned for any such intention. Again : under the third clause of the latter act, if both father and mother be dead, or when the mother shall die, the father being not alive at the death of the child, the estate is directed to go to the heirs on the part of the father ; and for want of heirs on the part of the father, to the heirs on the part of the mother. This supposing it to mean the case of a descent, and that of a descent from the mother as well as a descent from the father, contradicts the spirit and letter of the proviso contained in the 3d and 4th clauses of the first act ; for by them the rule of descent amongst collaterals further removed than the children of brothers and sisters—that is to say, amongst uncles and aunts shall be the same as the rules prescribed for descents amongst brothers and sisters ; that is to say, brothers and sisters on the mother's side of the whole and half blood, shall exclude those of

the half blood on the father's side : yet according to what is contended for, if lands descend from the mother to the son, and the son die without children and without brothers and sisters, and the father be dead, the heirs on the part of the father, namely, uncles and aunts on the father's side, shall exclude uncles and aunts on the mother's side, which in the case of a descent from the mother, is expressly negatived by these clauses. The words of which are, "And the same rule of descent shall prevail amongst the half blood of the maternal line under similar circumstances to the exclusion of the paternal line ; and the same rules of descent shall be observed in collaterals where the collaterals shall be further removed than the children of brothers and sisters." By these clauses, the uncles and aunts on the father's side, can at best share only equal parts of the estate with the uncles and aunts on the mother's side : yet by the construction contended for, and allowing the words "otherwise acquired," to mean an acquisition by descent from the mother, the uncles and aunts on the father's side will in the case above supposed, exclude the uncles and aunts on the mother's side entirely. For the words of the third clause of the second act are, "After the death of the mother, then in the heirs of such intestate on the part of the father ; and for want of heirs on the part of the father, then in the heirs of the intestate on the part of the mother." Again : the third clause of the latter act contemplates such an acquisition as leaves it to accident whether the father shall be living or dead at the time of the child's death ; and supposes that such accident may carry the estate to the mother, saying, "By which the descent may be altered by the accident of death and the paternal line deprived of the inheritance by such accident." Then it cannot be meant of an estate which had descended from the father, for he being dead, it could not be in the power of accident to effect what the act complains of : and if not meant of such an estate, neither is it meant of an estate descended from the mother, for it supposes her also to be alive ; it being now to go "to her if the father be dead, for life."—Moreover, the act meant to prevent a deflexion of the heritable line by the accident of one person dying before another, and to provide that if the father be dead and the mother alive, that accident shall not change the heritable line. Suppose then the child die before the mother, and the words *otherwise acquired* be intended of an estate descending, the father is entitled to be tenant by the curtesy, and the inheritance goes to the heirs on the part of the mother ; but if by accident the child die after the mother, it goes to the father and his heirs. If by accident the father dies before the mother, and then she dies, her estate will go to her son ; and upon his death, without children or brothers, to her relations. But if she die before the father, and the lands descend to her son, who

dies without children or brother, then the estate will go to the father's relations.

By such a construction, when we avoid one mischief we fall into a greater. We avoid the operation of the accident as to the father, but establish such accidents and give them efficacy against the relations of the mother. In the case of a descent from the father, if there be no child, the widow is entitled to one third, and the father's relations to the residue: what reason then to give her the whole, when by the death of the child she stands in the same situation as if there had been no child originally? In the case of a descent from the mother, if the child die before her, the father is entitled to the whole for life: what reason then to give him the inheritance, when by the death of the child after his mother, his situation is precisely the same? All these considerations prove the words "otherwise acquired" not to be intended of a descent from either parent; and then they must mean an estate acquired by gift, devise or descent from some person other than a parent. If it be objected that the third clause has in view the estates last mentioned, and in respect of them, supposes the possibility of the father and mother being alive to take; and also had in view the case of an estate acquired by descent—in respect of which, not that supposed possibility, but only the general words directing the descent to the parent living are applicable. The answer is, that such a position involves this dilemma: either the words of the third clause, keeping the estate in the father's family, in all events goes further than the spirit of the clause warrants, which was only to keep in the father's family, estates acquired by gift, devise or descent from a stranger; and then the generality of the words should be restrained to such estates only; or these words do not at all contemplate estates descending from parents, and then such estates are out of this clause. It may be said, the words *otherwise acquired*, as used in the seventh clause of the former act, do extend to an estate coming from a parent by descent; and such estates not being within the amending clause, must be governed by that seventh clause. Such mode of considering the subject will avoid the mischief of carrying the mother's estate into the father's family, and of contradicting the rules established in the foregoing part of the act: but then it will lead us to as great an absurdity on the other side; for by the seventh clause of the former act, the estate there spoken of as falling under the words *otherwise acquired*, is to go to the father if living, and his heirs; and if dead, to the mother and her heirs. Then suppose that lands have descended to a son from the father, and the son die intestate and without children, and without brothers and sisters, the mother and her heirs will succeed to the estate descended from the father; although the third and fourth clauses of the former act expressly carry such

estate to the uncles and aunts on the father's side ; if not exclusion, at least jointly with uncles and aunts on the mother's side. It is impossible to avoid absurdity and contradiction if we suppose the words *otherwise acquired* to be intended of an estate acquired by descent from a parent ; but if we suppose them to mean an estate acquired by gift, descent or devise from a stranger, then there is no injustice in preferring the father's family. The mother's estate is not carried into his family : uncles and aunts on her side are excluded from a share of the estate descended from her. The third and fourth clauses introducing such uncles and aunts into the succession where the child dies without children and without brothers and sisters, is not supererogatory : the father and mother both stand an equal chance to succeed according to the words of the act : the estate descending from the father is not carried into the mother's family, in exclusion of the uncles and aunts on the father's side ; for such estates by gift, descent or devise from a stranger, may descend without any such absurdity or contradiction ; and we satisfy the words of the preamble to the fourth clause, stating the old rule was often iniquitous ; and steer clear of the iniquitous and unjust consequence of excluding the mother's relations from sharing in the estate descended from her, and of excluding the father's relations from the estate descending from him : and therefore I am of opinion that the genuine meaning of the words *otherwise acquired*, as used in the seventh clause, is attained by understanding those words to comprehend an estate acquired by gift or devise from a stranger, and not by descent from a parent. And as the estate in the case now before us, did actually descend on the part of the father, that therefore the present is not such a case as entitles the mother to succeed within the meaning of the before mentioned clauses, and consequently that the estate descended on the death of the son to his paternal aunt of the half blood on the mother's side.

Judgment for the defendant ; but at the request of the plaintiff's counsel, it was sent to the Court of Conference for their consideration.

Hillsborough, October, 1800.

*Newton vs. Robertson.*

THIS was a warrant upon an evidence ticket. The plaintiff was a married woman ; had been summoned on behalf of Robertson as a witness in the cause between him and Stewart. Robertson obtained judgment against Stewart ; execution issued for the principal and costs, and was returned *nulla bona*. The plaintiff then warranted Robertson, who appealed to

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the county court, and from thence to the superior court.—The general issue was pleaded.

*Haywood*, for the defendant.—The plaintiff being a feme covert at the time of her attendance as a witness, whatever she earned by that attendance, belongs to her husband. Had she been a feme sole, and sued alone after marriage, that would be a matter pleadable in abatement: but being a feme covert when the action accrued, that may be given in evidence on the general issue.

*Taylor*, Judge.—It ought to have been pleaded in abatement; so there was a verdict for the plaintiff.

*Haywood* gave notice that he would move to have the verdict set aside and a nonsuit entered. Accordingly, a few days afterwards, he moved that the verdict be set aside and a nonsuit entered. He insisted upon his former distinction, and argued that whatever accrues during the coverture, for work or labor done by the wife during the coverture, belongs to the husband only: and that being shewn on the general issue, proves that the money to be recovered, does not belong to the wife who sues for it, but to the husband: and should she, notwithstanding such evidence, be permitted to recover, that will be no bar to the husband; and he may sue and recover upon the same cause of action. The case is otherwise, perhaps, when the cause of action accrues to her *diem sola*; for then, if the general issue be pleaded, such evidence would shew that she is entitled for her choses in action do not belong to the husband till reduced into his possession, but to the wife: and at the time of the trial, when the evidence is given, they are not reduced into his possession. Should she recover, she cannot afterwards sue, having already recovered.—In the latter case, a plea in abatement is proper, because the defendant can point out a better writ for the plaintiff; namely, a writ joining the husband, to the end he may answer costs if the judgment of the court should be against him. But in the former case, a plea in abatement is not necessary, because it cannot give the plaintiff a better writ, but shews she is not entitled to any writ at all: for if upon such plea her writ be abated, she must sue; and in strict propriety she cannot be joined: *Vide* 2 Bl. Rep. 1236. It is said by the counsel on the other side, that if a feme covert recovers upon a cause arising during the coverture, that may be pleaded in bar of an action brought by the husband. That cannot be a correct position, for if it be, then a wife by collusion between her and the debtor of the husband, may get judgment against the debtor, and put it in his power to bar the husband whether he will or not; for the husband being no party to the suit brought by the wife, cannot plead in abatement. Besides, if a recovery be pleadable in bar to the husband, so also will a judgment against the wife, upon a plea to the merits; and then the wife may destroy the

husband's action for every debt that is due to him : she has nothing to do but to sue his debtors, who may plead to the merits ; and by not producing evidence on the trial, have a verdict and judgment against her—which, according to the doctrine contended for, bars the husband forever. Strange's Reports, 88, proves the position, that whatever the wife earns, belongs to the husband. Then let us suppose an *indebitatus assumpsit* brought by the wife alone for such earnings : the declaration must state the promise to the wife, who is the plaintiff in the action ; and when the evidence is given, it proves the promise implied by law to have been given to the husband and not to the wife, and is a palpable variance from what is set forth in the declaration ; and such a variance by all the books, is fatal to the plaintiff's action. There are authorities to shew that such evidence may be given in the general issue, which proves it need not be pleaded in abatement : 1 Strange 79. In trespass for assault and battery, the defendant gave in evidence his marriage with the plaintiff, which she encountered by giving evidence, that at the time of that marriage, she was married to another man, who was alive at the time of the second marriage. 3 Wilson 3, and 6 Term, 265, prove the same thing. In these cases, coverture was given in evidence on the general issue, the cause of action having accrued during the coverture, which establish the position that it need not be pleaded in abatement, and defeats the answer now made to my objection. This answer was the other day attempted to be supported by 4 Bacon Ab. 59. The passage relied upon states, that coverture before the writ sued, is *de facto* on abatement ; whereas coverture pending the writ only makes it abateable, but both must be pleaded, coverture pending the writ after the last continuance, but coverture before the writ at any time, &c. If this be intended of a plea in abatement, strictly speaking, it cannot be law ; for by the rules of law, a plea in abatement must not only point out a better writ, which here it does not, but also must be pleaded before a plea in chief : whereas the book says the plea in abatement here spoken of may be pleaded at any time, as I understand it, the next moment before the trial. In another respect also, that which is here called a plea in abatement, does not answer that description : the chief end of a plea in abatement, is to save expence and the attendance of witnesses on a plea in chief ; but according to this book, the fact may be disclosed by pleading after a plea in chief, at any time and after the witnesses have been attending, perhaps several terms on the plea in chief. It is clear therefore, the author does not mean a plea in abatement properly so called ; but that whenever it appears to the court that the plaintiff is a feme covert, that shall hinder her proceeding to a recovery—That matter did appear to the court in the present case upon the evidence ; therefore she ought not to recover. The distinction

between the accruing of the action *diem sola* and during the coverture is a plain and palpable distinction, pointing out very different consequences, shewing in one case that at the time of the trial the action and right to the thing recovered belong principally to the wife, without whose joining there cannot be a recovery: but in the other that at the time of the trial the cause of action and the right to the thing to be recovered is not in her but in the husband, who can recover without joining the wife, who is not a necessary party; and therefore in the latter case there cannot be a plea in abatement for she cannot have a better writ, nor indeed any writ at all. And if a plea in abatement be made, the witnesses to support that must attend in the same manner as upon a plea in chief where the same matter is relied on: no expence is saved to the parties by a plea in abatement which is one of the principal objects of a plea of that kind. If the distinction now insisted on be attended to it will reconcile all the authorities, I mean all the modern ones, where the subject has been accurately considered, and this will afford a strong proof that the distinction itself is a sound one.

Mr. Cameron and Mr. Norwood replied. They insisted that the disability of the plaintiff should be pleaded in abatement.—Mr. Cameron cited 3 Term 626. Mr. Norwood remarked that the case in Wilson 3 was so decided because there the fifty pounds paid by the wife was the money of the husband, and also because the wife could not give a warrant of attorney to confess judgment; and he cited 4 Ba. Ab. 16, 18, Cro. J. 77. 2 Wels 424.

Judge Taylor.—I will not immediately decide upon this question, but by way of breaking case I will mention that it is a true rule that a plea in abatement must give the plaintiff a better writ. Where the cause of action arose *diem sola* it is admitted she may have a better writ by joining the husband. If therefore it should turn out upon further investigation, that the wife may be joined in cases where the cause of action arises during the coverture, then it will follow that in this case also she may have a better writ by joining the husband. I am at present inclined to think she may be joined in such case.

On the last day of the term he gave judgment for the plaintiff, saying—It is a general rule in all cases, without regard to the distinction made at the bar, that coverture in the plaintiff must be pleaded in abatement and that it cannot be given in evidence upon the general issue. 1 Strange 79. 2 Wilson 3. 6 Term 265, do not when properly considered establish the point they were cited to support.

*Quere de hoc.* Vide H. Bl. Rep. 114—Cro. J. 644—2 Wilson 414—1 Ba. Ab. 290—Salk 114—Plo. 2—Show. 30—5 C. D. pleader—2 W. 21—2 Bl. Rep 1239—4 Mo 156—Carth 251.  
Haywood, for the Defendant.



*Alston vs. Harris's executors.*

**T**HE plaintiff had obtained judgment against three executors, upon the plea of *plene administravit*, found against them; a *fi. fa.* had issued and *nulla bona* returned; and now Mr. Norwood moved that a special *fi. fa.* should issue, commanding the sheriff to levy the goods of the defendants if no goods of the testator to be found.

*Haywood e contra.* A *fi. fa.* as asked for has been issued in our courts, and in some cases it is not attended with any inconvenience. But in the present case one of the executors never had in his actual possession any of the goods of the deceased, but the other two only: they therefore ought to be only answerable for the *devastavit*: 2 Bl. Ab. 395. Godol. 134. Off Exe. 100. Again: a *fi. fa.* must be grounded on a judgment which warrants it; and the judgment for the plaintiff is, that the debt be levied *de bonis testatoris*: there must be a new judgment to be levied *de bonis propriis* before an execution can so issue. Again; there should be a *sci. fa.* to shew cause why it should not be levied *de bonis propriis*; for suppose after the verdict and judgment in the first action, the goods which were assets, are destroyed without default in the executor; as by lightning, fires, death or the like, he ought not to be answerable for them; and yet he must be liable unless he has an opportunity to shew that to the *sci. fa.* *Pewier's case* is that which is relied on for the support of the motion, but there the *fi. fa.* is grounded on the return of the sheriff, that the executor hath wasted; and he cannot levy *de bonis propriis* unless the defendant hath wasted, and it so appears to him: if he levies on any who hath not wasted, he is subject to an action. A *sci. fa.* for the above reason is necessary before the sheriff shall be commanded absolutely to levy *de bonis propriis*. And of late years the practice hath been in the English courts to bring the defendants into court by *sci. fa.* or action of debt grounded on a *devastavit*, so as to give him an opportunity to answer, and to have a judgment against him in *proprio jure* before an execution issues to levy *de bonis propriis*. L. R. 589. Wil. Rep. 259. 1 Atk. 192.

*Taylor, Judge*—The practice in this country hath been to issue a special *fi. fa.* for the sheriff to levy *de bonis propriis*, if it can appear to him that the defendant hath wasted: but I will take time to consider. Afterwards at another day, the parties informed the court that a compromise had been made with one of the executors, who no longer insisted upon the *sci. fa.*

*Per curiam*—Let the special *fi. fa.* issue as prayed for.

*Nash vs. Taylor.*

**T**HE master made up his report on the first equity day; and the counsel for Taylor moved for time to file excepti-

ons, which the court granted, ordering the exceptions to be filed within the term. On the next day, being that on which the court was to rise, the exceptions not being made out; the counsel for Taylor stated that they had not had time to make out the exceptions.

*Per curiam.* TAYLOR, Judge—The rule is to give time to file exceptions at any time during the term, when the report comes in during the term; and this extends to the last day of the term though the court should rise sooner. The court upon a proper application, will enlarge the time for filing exceptions even beyond the term; but I do not see in the present case but that the time already allowed is sufficient.

*Haywood, for Defendant.*

*Mitchill vs. Cheeves.*

*PER curiam*—TAYLOR, Judge. When a father sends negroes with his daughter lately married, to the house of the husband, that is *prima facie* evidence of the gift. It is however, but presumptive, and may be overturned by a contrary presumption or express proof. If the possession of the husband be for any considerable time and uninterrupted, that is a very powerful presumption of a gift, and will not be overturned but by very clear proof of the contrary. The presumption in the first instance arises immediately, and does not, as the defendant's counsel contended, require a long and continued possession, such as is stated in the case of Carter's executors against Rutland. Also, it is very true that a delivery must accompany a gift of personal chattels; but then an after acknowledgment that he has given, is evidence of the delivery.

*Haywood, for Plaintiff.*

*Vick vs. Kags.*

*PER curiam*—TAYLOR, Judge. If possession be not taken at the time of the sale, but the property still remains in the possession of the vender, that is a mark of fraud: so also it is a mark of fraud if the deed be absolute and unconditional, and the property remains with the seller. The property ought to accompany and follow the deed as stated in the 2d Term, 586, 597; but I cannot agree with that case, that the property going otherwise as to its possession than the deed points out, is absolutely fraud. It is also a mark of fraud if the transaction be secret; and by secrecy is meant, if it be done in the presence only of near relations, being such persons who may be relied upon not to disclose what they know, to the neighborhood of the seller; or if it be done at such a distance from the neighborhood that it is unlikely the affair will become known to them.

— vs. *May*.

**PER curiam**—This action is founded upon a deed acknowledging that defendant owed a debt, and in consideration thereof, conveying lands to the creditor who is authorised to sell for his satisfaction. There is no covenant for payment of the money, and the point reserved is, whether a covenant to pay the money can be implied from any part of the deed.

I am of opinion the acknowledgment of the deed is not enough to raise such an implication upon, for the same deed also shews it satisfied. *Vide* 1 P. W. 291.

*Jesse Gober vs. Gober.*

**PER curiam**—TAYLOR, Judge. The plaintiff is detained as a slave, and has commenced this action to recover his freedom; and now moves without any affidavit, that defendant be ordered to give security, that the plaintiff shall be forth coming at the next term. I remember that in the case cited from Haywood's Reports, at Fayetteville, that the motion was founded on an affidavit, though the case does not state that circumstance.—The court will not interfere but where it is induced to believe by affidavit that defendant is about to send the plaintiff out of the country in order to defeat the end of his suit, or to adopt other means calculated for the same end.

*Littlejohn and others vs. Burton, executor of Williams.*

**PER TAYLOR**, Judge.—If the defendant prays time to answer, and afterwards within the time he answers, denying combination and demurs for the residue, that is sufficient compliance with the order.

*Anonymous.*

**THE** plaintiff alledged, the negro in question had been given to him by his father and delivered; the defendant alledged that the father (many years after this transaction was stated to have happened) by bill of sale conveyed the negro to him; and the wife of the father was introduced by the plaintiff to prove the gift.

*Taylor*, Judge.—She cannot be received as a witness. The father himself could not be a witness, because he shall not be suffered to defeat his own deed; and if he could not, neither can the wife, for she is not competent to prove a fact which he could not be admitted to prove. He relied on 1 Term, 296, and said he was not aware of any decision which had restrained the rule there laid down to negotiable papers only.

*Sullivan vs. Alston*

ONE of the points debated in this cause, was, whether length of possession and other circumstances, may be used as evidence to prove that a grant once existed.

*Per curiam.* JOHNSTON, Judge.—A jury are at liberty to infer a grant from circumstances, although the grant is not now to be found. Cowp. 109, and the books there cited, are good law; and length of time itself may be taken as evidence of a grant.

*Long's Executors vs. Baker.*

IN this case the following points were held by the court upon argument :

*Johnston, Judge.* 1st.—When reasons of arrest in judgment are intended to be filed, they must first be shewn to the court and the permission of the court obtained for filing them.

(*Quere de hoc.*)

2nd.—This assignment made by Long, the obligee, to Hamilton, who was a subject before the declaration of independence, shall be taken to be a vesting of the interest in Hamilton. It is in the nature of a power of attorney irrevocable; and instances have occurred before the revolution, where courts of law have taken notice of such assignments, and have protected them against the acts of the obligee.

3dly.—This is an action upon a bond, wherein the heir is named—and it is against the heir: and now it is objected that the act of 1777, ch. 2, sec. 29, exempts the lands from execution as long as there is personal property; and that the death of the ancestor makes no alteration in this respect; and that therefore after his death, the lands are still not liable till the personal estate is exhausted; that the same idea is preserved in 1784, ch. 11, sec. 5; and that the preamble of 1789, ch. 39, clearly supposes the old common law remedy by action of debt, lies not for a creditor against the heir. To all this, the answer is, that by the common law the action of debt lay against the heir; and there is no act of Parliament nor act of Assembly which takes away that remedy—and therefore it lies still. The act of George II. was not made to narrow but to enlarge the remedy of creditors: the act of 1777 intended to enable a debtor to save his lands by shewing personal property: the act of 1784 provides for the case where creditors first sue the executors, who discharge themselves of their assets, and the preamble of the act of 1789 speaks in reference to that act.

*Jones and others vs. Jones and others*

*PER curiam.* JOHNSTON, Judge.—Jones, the testator, provides by special legacies for his children; and then gives the use of some negroes to his wife for her life; and it is stated and

admitted that she sold a descendant of one of these negroes. But it is stated in the answer, that she was under the necessity of selling this negro for the support of her family.

And I am of opinion that a court of equity will validate a sale under such circumstances. A devise to her use, means to the use of herself and her children; or in other words, for the support of herself and family: therefore I direct that one of the inquiries to be made by the jury shall be, whether or not this negro was sold for the necessary support of herself and children.

The enquiry was made and found by the jury in the affirmative; and thereupon the court dismissed the bill as to the negro so sold, and her increase. *Quere de hoc.*

*Sweat vs. Arrington, Administrator of Armstrong.*

**PER** curiam. JOHNSTON, Judge—In 1783, Armstrong drew the pay of the plaintiff, a soldier, who lived (near the place where the commissioners sat) for five or six years afterwards, and never made application in his lifetime.

I am of opinion the act of limitations began to run from the time of the accruing of the action, and that was immediately after drawing the money.

It is said, however, that the drawing was fraudulent, and that is a circumstance which will impede the running of the statute. Supposing it to be a fraud, which however there is no evidence of; then the act will not run but from the time of its discovery: and when was that? Certainly from the publication of the lists made out pursuant to the act of 1792. It was some time about the beginning of the year 1794 when the printed lists were deposited in the office of each county court clerk: this list stated the name of each soldier, the amount of his account settled, with the commissioners, and by whom the money and certificates were drawn. The act of 1792 was a public law, and all persons concerned were bound to take notice of it, and of the list published in pursuance of it: Consequently, the plaintiff as well as others concerned, had notice from the beginning of the year 1794, who had drawn his pay; and not having sued till the year 1798, more than three years are elapsed from the time of the discovery—And so he is barred.

Verdict and judgment accordingly.

*Trustees of the University vs. Gilmour.*

**GILMOUR** sold some lots and a small piece of land in Halifax to Black, and Black sold to Kay, who brought a bill for a specific performance, and had a decree for a conveyance from Gilmour—and then died before any conveyance, leaving his heirs aliens in the kingdom of Great Britain.

*Per curiam*, after argument. JOHNSTON, Judge—The act

giving escheat lands to the University, meant to substitute the University in the place of the public, in regard to all such real property as fell to the state for want of heirs capable to take.— I therefore think the University are entitled. But they take the lands and lot, subject to the burthen of paying the money now due for it.

*Quere*, of the obligation upon the University; for he did not state any known principle nor cite any authority to shew that the debt did not descend as usual upon the heirs and executors of the purchaser; nor any principle from whence it could be deduced that lands should become liable to a specific lien which were not so at the death of the testator or purchaser.

*Jeffries vs. Hunt.*

**EJECTMENT.** Osborn Jeffries devised as follows: “*I give to David Jeffries, his male heirs and assigns forever; and for want of such, to the male heirs of Simon Jeffries, the lands in question.*” There was a devise in the same will to Simon.— David, at the date of this will, had daughters but no son, and died without ever having had a son.

*Baker* for the plaintiff, insisted that David took nothing, and that his male heirs were intended to take as purchasers; and that he dying without having had male heirs, the devise became inoperative, and the lands vested in the lessors of the plaintiff, the sons of Simon, who were in being when the will was made, and are designated as purchasers by the words used in describing them.

*Per curiam*—David Jeffries surely was not intended to be disinherited by this will—Another part of the will takes notice that part of the lands in question, lying on Roanoke river, was devised to him by the clause in question. If he took at all, he took an estate entail male, which by the operation of the act of 1784, ch. 22, is converted into a fee, and descended on his death to his daughters; or went as his will directed.

Verdict and judgment for the defendant, who acted for the daughters.

Wilmington, November Term, 1800.

*Cutlar and Hay vs. Spiller's Administrators.*

**M'CAY**, Judge.—A conveyance by deed of personals to one for life, is a conveyance of the absolute property, generally speaking: but I have great doubts whether the rule applies to slaves as subjects of property.

Such limitations of slaves with remainder over by deed, has been generally practised and understood to be good; and is countenanced by the case of Timms and Potter.

Let the jury give their verdict and I will carry this case to the court of conference, to be decided upon by all the judges.

The jury found for the reversioner who had given an estate for life, not disposing of the residue; and the court of conference ordered a new trial; for that a gift for life by deed, was a gift of the absolute property to the donee for life.

*Vide* Timms and Potter, Haywood's Reports, 1 vol 234.

## Newbern, January Term, 1801.

*Foy vs. Foy.*

**T**HE bill states that Thomas, a brother of both the parties, purchased in conjunction with the defendant, a tract of land, and paid half the purchase money: That title for the whole was made to the defendant, who promised to convey to Thomas—and that afterwards Thomas died. The answer denied these allegations. The proofs supported the bill, but evidence was given on the side of the defendant, that Thomas, before his death, said, if he (Thomas) should die without a child, that he did not intend the defendant should be called on for an execution of his promise; and when his will was written, he assigned as a reason for giving more slaves to the complainant than he did to defendant, to be, because defendant had the half of the lands purchased by his money, which made his share equal.

*Hugwood*, for complainant—A trust estate when once raised, is governable by the rules of the common law, with respect to its transmission and descent. It will descend according to the rules of the common law; it is subject to a tenancy by the courtesy; a devise of it must be attested in the same manner as the devise of a legal estate: 5 Ba. Ab. 391, 2 P. W. 645, 1 P. W. 109, 1 Bl. Re. 160, 161, Sand. on Uses, 188. In the latter case, the intention to give to the devisee, was as clear, if not clearer, than the intention in the present case to give the trust estate to the defendant; but that intention could not prevail, because the rule of law required three attesting witnesses. So here a trust estate in one half being clearly in Thomas, how was he divested of it? Not by any deed registered and duly registered which our law requires in regard to legal estates, but by a mere parol declaration, which if not equal to the purpose, will still leave the trust estate where it was; and then at the time of his death, it passed as to one half by his will to the complainant. There is great reason why the rules of law should be applied to such estates: they are generally created for helpless and weak persons, and children not having prudence and strength of mind enough to take care of themselves, or for married women; such persons in short, from whom parol declarations can be most easily drawn, and who least weigh their expressions.

If a deed be not requisite, how liable are all such estates to be defeated? By false testimony or the unweariness of those for whose benefits such estates are most commonly provided.

*Baker, e contra*—It cannot be denied that if a trust estate existed at all in Thomas, its creation is evidenced by parol; and as every thing may be dissolved by the same ceremony with which it is made, it seems to follow that a parol declaration is sufficient to pass a trust estate.

*Taylor, Judge.* There can be no doubt as to the justice of this case: It is evident Thomas intended his half of the land to remain with the defendant; but if there be any such rule as is contended for by the complainant's counsel, it must be followed. I will take time to consider.—And finally, he decided that the parol evidence was sufficient. He said the statute of frauds in England enacts that no creation of trust or declaration of one shall be proved by parol evidence: whence it was to be inferred that before that act, such parol declaration was valid, and our law is the same as in England before that statute:

*Allen vs. Jordan.*

**JORDAN** had given a note for payment of money, to Allen: which note was taken by the brother of Allen as his agent: he had been requested by Allen to subscribe his name as a witness to the note, but neglected to do so at the time of the execution: He did so afterwards and at another day.

*Taylor, Judge*—This is a material alteration of the note: suppose it were given on a condition known to the first subscribing witness, and then a suit were commenced, and the second subscribing witness summoned for the plaintiff to prove it. He may not know any thing of the condition, being not the witness called by the parties to attest: of course he will prove the note and, and the plaintiff will recover, notwithstanding the condition.

The jury however, found for the plaintiff; and Judge *Taylor* being moved for a new trial, refused it on the ground that the verdict was according to the equity of the case: the motion was opposed on the ground that this was a new trial, and that a second new trial should not be granted against two concurring verdicts.

*Woolford vs. Simpson, Administrator of Wright.*

**WOOLFORD** immediately after the death of the intestate, sued his administrator upon a simple contract debt: a specialty creditor also sued, and both writs were returned to the same term. The administrator pleaded to Woolford's action, *plene administravit*; and afterwards at a subsequent term, confessed judgment to the specialty creditor for £ 1000, and at a subsequent term, he moved for leave to add the plea of the



judgment, and no assets *ultra*. This was opposed in the county court, and leave was given by the court, and thereupon an appeal taken to this court. And now *Haywood* argued that the plea ought not to be allowed. The addition of a plea is only admissible for the purpose of attaining the justice of the case, which but for the addition would be excluded. It is incumbent then on the mover to shew an equity on the side of the motion, superior to that which opposed it. This the defendant cannot do: the plaintiff is equally a just creditor with himself; and immediately upon the plea of *plene administravit* pleaded, became entitled to a satisfaction of his demand out of assets, upon the event of that plea being tried and found untrue. Could the court have known that the plea was untrue when pleaded, they would instantly have awarded judgment for the plaintiff; but as they did not know it, time was given to try it: he still however continues entitled to their judgment, if the plea was untrue when pleaded; and this the confession of judgment proves. Then what is there to induce this court to take from him the advantage he has gained? Did he mislead the defendant? Is it not equally just that the defendant should submit to the inconvenience arising from his own mispleading, as that the plaintiff should lose his demand? A court of equity will not relieve against a just creditor on account of the mispleading of an executor: 1 Fonb. 147, 1 Ark. 192. And this proves that the equity of the simple contract creditor is at least equal to that of the executor's; and consequently the plea ought not to have been received.

*Baker, c contra*—The reason of the equity cases is, because the executor would not defend himself when he might. The court in such a case as the present would say to him, why did you not move for leave to amend the pleadings?

*Taylor, Judge*—The plea was properly received. I ground my opinion upon several cases in Wilson's Reports, which establish the rule that pleadings may be amended to attain the justice of the case.

#### *Manning vs. Brickell.*

*PER curiam*:—Brickell endorsed a note to Manning and Byrne, partners in trade, as satisfaction for a precedent debt due to the partnership: which note was released by Brickell to the maker before the endorsement. An action was commenced against the maker, and on that circumstance appearing, was dismissed, and the note returned to Brickell: then the partnership was dissolved and a receiver appointed, and this was published in a Gazette which circulated in the town where Brickell lived: After which, Brickell paid the debt to Byrne; and I am of opinion that if Brickell knew of the appointment of the receiver, his payment after such knowledge to one of the

partners was void; and that Byrne being since dead, the surviving partner is entitled to recover.

The jury found for the defendant; and a new trial being moved for, the judge refused it, saying, it would be a hard case on the defendant should a recovery be effected—and therefore he would not disturb the verdict.

*Anonymous.*

**EJECTMENT.** The plaintiff purchased from one who had been absent about thirty years or more in South-Carolina, who claimed as heir to his father, who had been absent forty years or more. Some years after the departure of the father, the defendant took possession, and claimed the land to the present time; and in 1784 obtained a patent from the state. The vender was on the land when the deed to the plaintiff was executed.

*Per curiam,* TAYLOR, Judge—This is not the conveyance of a right of entry, for the vender actually entered, and was in possession at the time of the sale. Secondly—The possession of the defendant before the grant from the state, was a naked possession without colour of title, and therefore he did not acquire the right of possession before that time; nor has he acquired it since, for there were not seven years uninterrupted possession prior to the vender's entry.

*Anonymous.*

**EJECTMENT,** in the name of a man who left the land in question, and absented himself 40 or 50 years ago, and has not been since heard of.

*Taylor,* Judge.—Long absence and not being heard of, is evidence of his death; and the plaintiff must be nonsuited.—And he was nonsuited.

*Anonymous.*

**T**HE bill states, that the testator devised that his executors should procure, if possible, the emancipation of his slaves; and if it be impossible that then the plaintiff should have them. Several assemblies have been held since the death of the testator, and they are not emancipated.

After argument—*Taylor,* Judge, delivered his opinion in favor of the complainant. He said the executors had only a reasonable time, not their whole life to perform the trust: they should have applied as soon as they reasonably could. Having not done so in several years, it is to be taken that the trust is impossible to be performed; and then the complainant is entitled.

*Webber vs. Sylva, Administrator of Sylva.*

THE defendant pleaded amongst other things, a judgment obtained against one Stoughton, of New York, and there was no replication filed nor entered on the docket. The cause being now called, a question arose concerning the replication.—It was said by Webber's counsel, that by agreement between the adverse counsel and himself, they were to go to trial, supposing a replication to be filed, and that the substance thereof was *per fraudem*. The adverse counsel did not recollect such agreement, and understood the replication to be general. It seemed to be admitted on both sides, that a replication is understood to have been made, though not filed; and the court was appealed to; who said it was agreeable to the practice to suppose a general replication, not a special one. But he said whenever the pleadings are in such a state, that they will not bring before the court the merits of the case, they might be amended;—and that therefore he would now admit a special replication; and when it was entered, that the opposite party might or might not try his cause at this term. The plaintiff replied *per fraudem*; and issue being joined, the parties went to trial, and there was a verdict for the plaintiff. But the defendant's counsel alledging, they were surprized by testimony produced on the part of the plaintiff, which their client could counteract by testimony to be had at New York, the court granted a new trial, notwithstanding it was greatly opposed by the plaintiff's counsel. The court in charging the jury, said, that every judgment in a court of competent jurisdiction, is to be presumed fair till the contrary be proved; and that the evidence to impeach it must be strong and convincing. This was in answer to what the plaintiff's counsel had said, namely, that where a judgment had been confessed by the executor as this had been, that amounted to declaration on his part, that he had satisfactory evidence to convince him of the fairness of the demand, and to an undertaking to produce this satisfactory evidence whenever a creditor called for it. And his not doing so when called on, is a proof that he had not such evidence; and then the consequence is, that he has confessed, not knowing whether it was fair or not;—from whence the jury may infer a fraudulent design.—And therefore on such an issue as the present, that slight testimony on the plaintiff's side to induce a suspicion of fraud, was enough to turn it upon the defendant to prove the judgment a fair one.

*Hester's Administrators vs. Burton.*

**MOTION** to set aside an execution for irregularity, which came to this court by appeal from the county court of Granville. Judgment had been obtained more than a year before the issuing of the execution, and there was an entry *that at the request of the defendant, execution should be stayed till further order.*

After argument and the production of authorities, Judge *Johnston* decided that the execution was irregular. If there had been a *cessat executis* to a certain time, execution might have been taken out after that time without a *sci. fa.* but here no certain time for the stay of execution is mentioned. The plaintiff might have taken it out the next moment after the entry: The entry makes no difference. If in the present case he can take out execution after the year, there is the same reason for his taking it out after any length of time whatever.

Execution set aside.

*Anonymous.*

**PER curiam.** *JOHNSTON*, Judge—A demand is not necessary to precede the action of detinue, in order to support it. The practice of requiring a demand to be proved on the trial, originated from a decision some years ago at Edenton—but the law is clearly otherwise; and I never could discover the principles on which that decision went.

*Benton vs. Gibson.*

**BENTON** filed his bill for an injunction, and *Gibson* answered; and exceptions in writing were taken to his answer, which were held good. Then he answered again, less evasively, but not to the entire satisfaction of the court; and *Benton's* counsel moved for leave to introduce affidavits in support of the matters alledged in the bill, and in disproof of the answer. And after argument and the production of authorities, *Johnston*, Judge, said he would permit affidavits to be read; and the next day they were read;—and thereupon the injunction was continued.

*Hurt vs. Mallet.*

**AFTER** reading the bill by the plaintiff's counsel, the counsel for the defendant remarked, that this was the proper time to bring forward a motion he intended to make; which was, that the bill be dismissed for want of equity. It stated an award, whereby the defendant was ordered to pay money to the plaintiff, but no cause whatsoever for applying to this court.—The remedy at law is complete for aught that is stated in this

bill. It is no answer to say that we ought to have demurred for that cause, for at that rate every cause proper for a court of law, may be brought into a court of equity and decided there by the consent or neglect of parties. It is a well known rule that this court, and indeed every other, must have jurisdiction by law over the causes it decides; and that the consent of parties cannot confer a jurisdiction which the law does not. Not demurring therefore, is not an admission of jurisdiction which the court can notice. At furthest it can only operate upon the discretion of the court in the awarding of costs. He cited 3 Atk. 1 Vesey, 341, 346, 163.

The counsel for the plaintiff replied,

*Et per* JOHNSTON, Judge.—I am very loth to dismiss this bill, which I understand has been many years upon the docket; but the authorities are too strong and pointed for me to get over.—Jurisdiction cannot be given to a court by the admission of parties, when it has not jurisdiction of the subject matter without such admission.

Let the bill be dismissed, each party paying half the costs,

### Halifax, April Term, 1801.

#### *Muir's Representatives vs. Mallet and others.*

**HARRIS** moved that the plaintiff should give security for the payment of costs, in the event of having a decree against him. And the plaintiff's counsel opposed the motion, upon the ground that executors ought not to be compelled to take the risk of costs upon themselves and their own private property. Before the act of 1777, executors plaintiffs were not liable to costs, for the acts of Parliament giving costs, although they made no express exception of executors, were construed not to extend to them, because of the hardship of subjecting an executor who acted not for himself, nor upon his own knowledge, but solely for the benefit of others, to the payment of costs. And the act of 1777, only directs that the costs shall go with the cause, except where otherwise directed by statute. The meaning of which I take to be, that where costs upon the construction of the statutes are not payable by an unsuccessful party, so neither shall they be under that act. The act of 1787, requiring security for costs, does not mention executors; and if we construe that act by the same rules which are applied in the construction of the British statutes on the subject of costs, executors if not named and expressly subjected, will be exempted from the general words of that statute. They are not to give bail by 1777, when sued as defendants, because it would be unreasonable to subject them to pay out of their own estate, which they might be compelled to do if surrendered and imprisoned.

It is equally unjust they should be subjected to costs out of their own estate when suing in the right of the deceased. If there is a probable cause of action, the law requires them to sue under the penalty of a *devastavit*; and if they do sue and are unsuccessful, it is now said they shall pay costs out of their own estate.

*Hall, Judge*—The act of 1787, requiring security for costs, is in general terms, and security must be given according to the motion.

*Quere de hoc.*

## Wilmington, May Term, 1801.

*Hostler's Administrators vs. Roan's Executors.*

**D**EFENDANTS pleaded at the last term, that the property was delivered over to the legatees after the expiration of the term prescribed by the act of Assembly.

And now *Mr. Wright* and *Mr. Gaston* moved to withdraw their demurrer to this plea, and to reply, because the fact was, that the executor before delivering over the property, had notice of the present demand, and they were prepared to prove it.

And after much argument, *Taylor, Judge*, allowed them to withdraw the demurrer and to reply; saying otherwise the court would have to decide upon a statement of facts which did not disclose the real truth and merits of the case. He also gave leave to defendant to amend his pleadings.

*Haywood*, for *Roan's Executors*.

*Anonymous.*

**S**NEAD had been a witness in a cause tried in this court.—His wages for attendance had not been taxed in the execution, and a year and more had elapsed. He had taken a *sci. fa.* in his own name, to shew cause why he should not have execution for them against the party cast.

*Taylor, Judge*—He is entitled to have his attendance dues taxed in the execution, although an execution omitting them has been previously issued and satisfied; but the execution in such cases issues at the expence of the witness. If a year and day has expired, he is also entitled to a *sci. fa.* to shew cause why he should not have execution; but then the *sci. fa.* should be in the name of the party who had judgment in his favor, for the witness is not a party on record, and therefore cannot have it in his own name.

*Sci. fa.* dismissed.

*Handy vs. Richardson.*

**S***CI. fa.* against the sheriff as bail; he had executed the writ but had not taken bail. Defendant pleaded that the gaol

was insufficient and had been protested by him, *nul tiel* record ; and that after the *ca. sa.* issued, the judgment had lain dormant for more than a year and day before this *sci. fa.*

*Taylor*, Judge, after argument—The record of the judgment is that which is referred to by the plea of *nul tiel* record ; and that agrees with the judgment stated in the *sci. fa.* though not with the *ca. sa.* the record therefore sufficiently disproves the plea. As to the insufficiency of the gaol, that forms no excuse for not taking bail ; for by the act of 1786, relative to the rebuilding of Franklin gaol, it is provided by a public clause, that the sheriff shall carry his prisoner to the gaol of the district.—As to the dormancy of the judgment, the cases cited 2 L. Ray, 1096, 6 Mo. 256, 304, prove that the bail cannot take advantage of that circumstance.

Judgment for the plaintiff.

*Swaine vs. Bell and Bellune.*

**EJECTMENT.** The boundaries of the patent under which the defendant claimed, were, beginning at the mouth of Cape-Fear, thence along the sea coast to Lockwood's Folly Inlet, then up a creek within the inlet along the western branch of said creek to the head thereof, thence a north-east course to Elizabeth river, thence down the said river to the beginning. It was contended that the other creek or eastern branch was the boundary to the head thereof. North 45 east, would not strike Elizabeth river, though a course to the north of east would.

*Taylor*, Judge. A natural boundary is always adhered to when called for. It cannot be altered as artificial boundaries may, by the marking of new lines, defacing marks or the decay of trees ;—therefore the western branch is to be taken to be the boundary. As to the next course it matters not that a north-east course was called for ; had it been a western course, which would have gone directly from Elizabeth river, still we must have proceeded from the head of the creek to Elizabeth river, that being a natural boundary, and the course is not to be regarded. As to the possession, it makes no title for the plaintiff or defendant, unless it has been under a colour of title.

*Hostler's Administrators vs. Scull.*

**AFTER** argument, *Taylor*, Judge, delivered his opinion.—Hostler was in possession of the slave in question ; Scull got the possession from him ; and after this action and pleading thereto, obtained letters of administration of the estate of John Vernon, to whom the negro belonged—And I am of opinion that Scull's proving the title of this negro to be in any third person, will disprove that the property was in Hostler, although Scull himself has no property, and will overturn the plaintiff's

claim; for in this action, the plaintiff must prove property in himself: And although his prior possession is evidence of property, still it is only presumptive evidence, which is overturned by proof of property in another.

*Quere de hoc.*—*Vide 7 Term, 591.*

A possessor of a personal chattel, who has got the possession not unlawfully, cannot be deprived of it legally, but by the true owner: and that was the substance of the argument of the plaintiff's counsel.

*Haywood* for Hostler's Administrators.

## CONFERENCE

At Raleigh, June Term, 1801.

**PER curiam**—If an indictment for murder describe the wound as given in the *brest*, omitting the letter *a*, 'tis fatal; and the judgment must be arrested upon a motion in arrest made after verdict. 5 Rep. 121, 123, Cowp. 229, Doug. 194, 1 Term 237, were cited for the state.

*State vs. Gainer.*

**HE** was indicted at Halifax at the last term, for horse-stealing, and challenged thirty-five jurors; and when the 36th was drawn, he also challenged him;—and the question arose and was referred to this court, to determine whether the said challenge should be over-ruled.

The counsel for Gainer argued in substance.—Challenging 36 jurors, and persisting therein, was punished at the common law by the *plene ferte et dure*, or pressing to death. This punishment cannot now be inflicted, our constitution having provided in the Bill of Rights, sec. 10, that cruel and unusual punishments should not be inflicted.—[*Taylor*, Judge—You need not argue that; it is clear it cannot.]—The common law in this respect was altered by the 22 Henry 8, Chapter 14; it directed in cases of felony, “*that he be not admitted to challenge more than 20.*” The act of 1777, ch. 2, sec. 94, that any person on trial for his life, *may* make a peremptory challenge of 35 jurors. In my judgment this being directly against the act of H. 8, is a repeal thereof; the one says he shall not be admitted to challenge more than 20—the other that he may challenge 35; and if it be a repeal, then is the common law restored, except as to the punishment of pressing to death. As this is a construction in favor of life, it ought rather to be adopted than the other, which is against life; more especially, if any circumstance can be laid hold of to shew that the legislature intended it as a repeal. There is such a circumstance, and it is a



very strong one ; not only the Assembly which passed the act of 1777, but divers Assemblies afterwards have provided in certain cases, the punishment of death without benefit of clergy, for challenging peremptorily more than 35 jurors ; see 1777, ch. 6, sec 1. 1779, ch. 11. 1783, ch. 1, sec. 8. 1785, ch. 5 ; each of them inflicting punishment, and all but one of them the punishment of death for challenging peremptorily more than 35 jurors. And were the legislators of 1777 so uninformed as to inflict the punishment of death for doing that which they themselves in the same session had rendered impossible ? Were they so absurd as to say you shall not be allowed to challenge the 36th juror, and if you attempt it the challenge shall be overruled ; and in the same session to say if you challenge the 36th juror and will not retract the challenge, you shall be punished with death ? If we will but remember who were members of this Assembly, it will be impossible for us to harbour the idea that they did not know what they were about nor what they intended. The act against horse-stealing, 1790, ch. 12, under which the prisoner is indicted, provides no punishment for challenging more than 35 ; and therefore the prisoner should be discharged.

*E contra*, It was argued that 22 H. 8, ch. 14, was altered by the act of 1777, only as to the number of jurors which the prisoner might challenge ; 35 is substituted into the place of 20. The expression used in 1777, *may* challenge 35, implies most strongly that he may not challenge more.

*Per curiam*, It was decided that his challenge of more than 35 shall be disallowed, and that he shall not be at liberty to refuse his trial by such means.

*Haywood* for the prisoner, by the appointment of the court.

*Simpson vs. Nadeau.*

**P***ER curiam*.—The British and French nations being at war, a Frenchman captured the plaintiff, a citizen of the United States of America, carried his vessel and cargo into a Spanish port, and disposed of both without condemnation.

*Per curiam*. The captor is suable only in the court of admiralty, notwithstanding the argument so much pressed by the plaintiff's counsel, that the prize court of the admiralty could proceed only where the thing taken was in its custody or power ;\* and as to the instance court of the admiralty, that its jurisdiction was concurrent with the courts of common law ;† and notwithstanding another argument also used by him, that according to the six carpenters' case and other cases, the defendant's not car-

\* 1 *Robinson's Reports*, 100, 119.

† 2 *Bl. Com.* 107. 1 *Dou.* 98, 99.

rying the vessel into port for condemnation, as his commission required, shews *q'uo animo* the seizure was made, which was not to treat her as a prize; consequently she was not taken *as prize*, but by a trespass or wrong.\*

*Haywood*, for the Plaintiff.

\* 2 *Brown*, 220.

*Moore vs. Bradley.*

**EJECTMENT** upon this devise, to wit: "*I give to my sons William, half my lands in North-Carolina, and if William or John die without heirs of their body, the whole to William or John.*" William died without issue, having first sold by a deed of bargain and sale to Newsome, and John made an actual entry before the passing of the act of 1784, ch. 22, but at the time of passing the act Newsome was in possession.

*Counsel for the plaintiff.* At the time of passing the act of 1784, ch. 22, there was no estate tail in being, for that had ceased by the death of William, without issue; nor any remainder, for that had come into possession. If the plaintiff is not entitled to recover it is because the act of 1784, ch. 22, has taken away his right of possession: He would certainly be entitled to recover had the act never been made. The words of the act are, "all sales and conveyances made *bona fide* and for valuable consideration, since the first day of January, 1777, by any tenant in tail in actual possession of any real estate, where such estate hath been conveyed in fee simple, shall be good and effectual in law to bar any tenant or tenants in tail, and tenants in remainder of and from all claim and claims, action and actions and right of entry whatsoever, of, in and to such entailed estate against any purchaser, his heirs or assigns now in actual possession of such estate, in the same manner as if such tenant in tail had possessed the same in fee simple."

First, if it was the intent of the legislature to take away the plaintiff's right of possession, the act for that purpose is void.—Secondly; it was not the meaning of the legislature to take away the plaintiff's right of entry. Thirdly; the words of the act do not comprehend the case before us. First, the legislature were authorised by the Bill of Rights, sec. 43, "*to regulate entails in such a manner as to prevent perpetuities.*" This gave them no power over estates not entailed; and as to other estates every citizen is protected by the 12th and 14th sections—"No freeman shall be dis-eized of his freehold or deprived of his freehold but by the law of the land;" which means, by due process of law, and by the judgment of a court of competent jurisdiction, proceeding by the known and established course of law. In the year 1785, the Assembly passed an act taking from all persons the right of suing for property sold by commissioners of confiscated estates,

and of course the rights of possession which such persons had. The Judges declared the act invalid, and in 1786 the Assembly altered it. On that occasion the legislature concurred at last with the judiciary in the position, that the legislature could not deprive any man of his right to property, or of his right to sue for it. One of the Judges illustrated his opinion in this manner: "As God said to the waters, so far shall ye go and no further, so said the people to their legislature." Judge *Ashe* deserves for this the veneration of his country and of posterity. Secondly, it was not the intention of the legislature to take away the plaintiff's right of entry: the preamble of the act complains of estates tail; the enacting part complains of estates tail, and converts them into fee simple. No design is intimated to meddle with any other estates. Estates tail were of two sorts; those where the tenant had not sold, which are converted into fee simple; and those where he had sold, which were secured to the purchaser by barring the claim of tenant in tail and tenant in remainder; the design was "*to do away entails*." Was it essential to the promotion of this design to take away an estate in fee as the plaintiff's was when the act passed, and to give it to another? The object was to free estates tail from the restrictions which rendered them unfit for a republic; was it necessary to interfere with an estate already free without the aid of the act? Was it necessary that the purchaser of an estate tail already at an end by the failure of issue should hold it preferably to him who, as tenant in remainder had become legally entitled to the possession by his entering upon it? Whether the one or the other held, it would not be a perpetuity; and it was of no moment to the public which of them held the lands.—Thirdly; if this act be construed literally it will not embrace the case before the court; and every act ought to be construed which tends to divest estates legally vested, 2 Dallas 316. If it be asked who are to be barred? the act answers, tenants in tail and tenants in remainder: the plaintiff was neither; for he had a fee simple in possession by his entry. If it be again asked, of what are they to be barred? the act answers, "*of a right of entry to such entailed estate*." John Moore's was a right of entry to an estate in fee; no estate tail existed which could be recon- tinued by entry. Again: against whom were they to be barred? the answer is, against him who was "*in the actual possession of the estate tail*." Newsom was not in the actual possession of such estate; it was extinct by the death of William without issue. The defeasible estate which Newsom had was actually defeated by John's entry; the possession which Newsom afterwards had was tortious: he was not a purchaser in actual possession of an estate tail when the act passed. The cases relied on on the other side, as determined in the courts of this state and in the circuit court, were cases where the estate tail actually

existed when the act passed; in the present case it had actually ceased and the estate in remainder had become an estate in possession and had been reduced into possession by entry. Let it be remarked that the act in this clause does not give a fee expressly to the purchaser; it declares simply, that the conveyance in fee shall bar tenants in tail and tenants in remainder: in the former clause it expressly converts estates tail not conveyed into fee simples: If it intended to legitimate the estate of the purchaser against all persons, why is it not said here also that he shall hold in fee simple? Why is the phraseology varied and the bar confined to persons of a certain description? Is it not because there might be persons of other descriptions who were not meant to be barred? Was it not because they did not mean to bar any others than tenants in tail and tenants in remainder? persons who had not a present right of entry, but a right only in expectancy, dependant upon the death of tenant in tail in the one case, and upon his death without issue in the other. Such rights were subject to the power of the legislature derived from the 43d section of the Bill of Rights; for they were connected with, and depended upon estates tail: They had no power over estates and rights legally vested and independent of estates tail: accordingly they have been careful to use such words as confine the operation of the act to cases within their power; to estates tail, and to rights expectant upon them: these words should not be extended to a case like the present, neither within the power of the legislature, nor within their contemplation, nor within the compass of the terms they have employed. Again: why was the person in whose favor the bar was to operate to be a person in actual possession at the time the act passed? It was because they did not mean to confirm the lands to a purchaser whose possession was legally defeated before the act. If a recovery had been effected by the issue in tail or tenant in remainder against the sale of the tenant in tail, these were legal acts which defeated the estate of the purchaser and were not to be invalidated. Will it be said that if the issue in tail had sued the purchaser from his father who made the purchase after 1777, and had recovered against him before 1784 and had been dispossessed by the purchaser before the act of 1784, that the estate so recovered would be barred by that act? If not, I would ask, is not the estate of the purchaser as completely overturned and defeated by an entry given and allowed of by law as by a recovery at law? They required to the purchaser to be possessed of the *estate tail*—why? because if that had ceased, a right of entry had accrued to the remainder man; and as it was unjust and beyond their power to defeat a recovery or actual entry of the remainder man it was equally so to defeat his right of entry to an estate in fee. If the estate tail continued and existed at the time of the act, the purchaser's was a legal possession; they intended therefore to confirm legal

essions, not those gained by tortious dispossession, nor those maintained after the estate tail had ceased. Again: what difference is there between an estate defeated by a recovery or entry, and one liable to be defeated by a present right of entry but unjustly withheld from the true owner? What reason could there be to induce the legislature to favor him who was liable to be dispossessed by a present right of entry, more than him who had been really dispossessed? What reason for favoring the owner who had regained and then lost his possession, more than him who was equally entitled but who had not regained it?— They intended no such difference without a cause for making it. They have used terms pointedly calculated to exclude from the operation of the act as well rights of entry already accrued as possession already taken by the remainder man at the time of passing the act, and therefore judgment should be for the plaintiff, John Moore.

Mr. Baker, *e contra*, insisted that as Newsom was actually possessed of the lands purchased from William, at the time the act passed, that he comes within the words and spirit of the act.

And so the court decided, and gave their opinion for the defendant.

*Haywood* for the plaintiff,

*Quere de hoc.*

## Newbern, July Term, 1801.

### *Harget vs. Foscoe.*

**PER curiam**, TAYLOR, Judge.—Where the defendant obtains an order of survey and does not execute it, and moves for a continuance of the cause, because it is not executed, he should satisfy the court that it is necessary on the trial.

Mr. Wood for the defendant, was obliged therefore to produce an affidavit, shewing the necessity of it; and upon that the cause was continued,

### *Murphy vs. Guion.*

**PER curiam**, TAYLOR, Judge.—The action for mesne profits does not accrue 'till after a recovery in ejectment, and possession obtained: then the defendant by relation, is a trespasser against the plaintiff's possession *ab initio*; consequently, if the action be commenced within three years after that time, the act of limitations will not bar.

### *Smallwood and Daniel vs. Mitchell and Hearne.*

**PER curiam**, TAYLOR, Judge.—If a witness be offered, the adverse party may by other witnesses, prove him interested, and he shall thereupon be rejected as incompetent.

The plaintiff offered the log book on the voyage, to shew the time of the vessel's arrival at Savannah, and her continuance there; also the time of her arrival at Beaufort in this state. It was not objected, and was delivered in evidence to the jury.

Defendant offered to read a copy of the sailing orders, and proved the original to have been in the plaintiff's hands.

*Per curiam*—You cannot read the copy unless you have given notice to the plaintiff to produce the original. It then appeared upon further examination, that the person who had the possession for the plaintiff, had searched for it, but could not find it.

*Per curiam*.—There is no difference as insisted on, between deeds and other writings; you cannot read a copy where you have not given notice to produce the original. The reading a copy where the original is lost, applies only in cases where the owner of the writing proves it lost, not where it belongs to the adversary.

*Smallwood vs. Clark.*

**P**LEA, the general issue, with leave to plead any other plea: and *Wood* moved after the jury sworn, to plead another plea, namely, delivered as an escrow; but the court said it is too late now to add another plea, as it will delay the plaintiff.—*Wood* then offered to give evidence under the general issue, that the paper now declared on as a bond, was delivered as an escrow, which the court refused. *Haywood* sitting near *Wood*, advised him not to give it up, for that there were precedents enough to support him. This brought on another argument; and *Wood* cited 6 Mo. 218. Mo. Ent. 186. 5 C. D. Pleader. 2 W. 18. 2 R. Ab. 683. Ray. 197. Mo. C. 217. 1 Salk. 274. Buller 172. 5 Rep. 119. 7 Mo. 53. Gil. L. E. 159. L. Ray. 354, 356, 357.

*Taylor*, Judge. Such evidence cannot be given on a general *non est factum* as here; but only upon a special one disclosing the fact of its having been delivered as an escrow; and that the conditions were not performed; and concluding, and so it is not his deed.

*Wood* being dissatisfied, caused it to be carried to the court of conference, where the opinion of Judge *Taylor* prevailed.

There is no doubt however, but that this decision is against law; and it has been acknowledged by Judge *Hall* to be so in two instances, which have since occurred.—And he argued thus:

If upon *non est factum* pleaded, the plaintiff gives evidence of an execution by the defendant and delivery to the plaintiff, and the fact really be, that it was delivered to a third person on condition, shall not the defendant be allowed to prove this on his part? and if he does prove it, shall the plaintiff still recover?

This short argument is unanswerable.

*Quere de hoc.*

*Hampton vs. Garland.*

**T**AYLOR, Judge. The act of 1789, requiring all the living witnesses to be produced if to be had, means, if the persons attesting are competent to be witnesses at the time of the trial of the issue *devisquit vel non*; but if any of them has become incompetent by means of an interest accruing after the attestation, as by the death of a legatee to whom the witness is entitled to succeed, or by becoming informers; the person endeavoring to prove the will, need not offer such witness. 2d: Although it is insisted that a witness shall not be produced by the opposer of the will to deny his attestation; and that it would be productive of ill consequences to the public if a man who had undertaken to the testator that he would support the will, should be allowed against the undertaking to act a contrary part; and that such a rule would expose many good wills to be overturned and the witnesses to temptation where the estate was considerable: And notwithstanding the case in 4 Barrow, 2224, I am of opinion the opposer of the will may offer the attesting witness to disprove the sanity of the testator.

*Tyson vs. Simpson and others.*

**T**HE plaintiff's husband died, leaving a stock of cattle, which she took into possession: the old stock is gone and a new one arisen, and that new one gone and another arisen; and lately the defendant having obtained administration, took them from her. The possession of the original stock and of the increase, had been for forty years and more. This case was reserved by Judge McKay, in July, 1800, for consideration.

Taylor, Judge, after argument—The increase of the increase *ad infinitum*, belongs to the owner of the original stock: the plaintiff cannot have acquired property by possession. The act of limitations did not run so as to bar the action of the administrator; the letters were obtained not till lately; and the act begins to run only from the time of obtaining them. It has been decided that the increase of negroes and their increase, belong to the owner of the wench from whom all descend; and I cannot distinguish the case of negroes from that of other animals. Judgment accordingly.

*Vide* 2 Bl. C. 390, 504. 3 Ba. Ab. 301. 5 Ba. Ab. 169. 7 Rep. 17. Also *Vide* Sullivan, 314. Grot. B. 2, ch. 5, sec. 29, ch. sec. 18.

*Hanks vs. Tucker.*

**I**N this case the defendant could not produce a deed or patent, or other colourable title, but proved possession for 40 years under marked lines, with some other circumstances, such as the reputation of the neighborhood for a long time back, that the

lands were the defendant's; and an acknowledgement on the part of the plaintiff, that they were covered by patent.

*Per curiam.*—Under the act of 1715, or of 1791, possession of itself will give no title to the possessor; but an uniform possession for 40 years under circumstances which convince the jury that a grant once existed, is a ground for them to go upon, in saying there was a grant. If the jury in the present instance are satisfied from the evidence laid before them, that a grant did exist, they will find for the defendant.

Verdict for the defendant.

*Sasser vs. Alford.*

THE defendant claimed the lands described in a patent, to Smythwick, beginning at the mouth of Bear Creek on Little River, thence up the creek No. 5 W. 248 poles to a gum, then up the north prong of said creek, No. 45 E. 264 poles to a hickory, thence a certain course to the river, and down the river to the beginning. The artificial course described as the two first lines, declined from the creek and north prong, and the second course struck the river before the number of poles called for was completed; and by that means the third line was excluded altogether. Some distance up the branch from the beginning, was a branch running to the north-east, which was insisted to be the north prong; but that branch was only 140 poles from the beginning; neither was it long enough to answer the distance called for in the second course; and taking that for the north prong, the distance would have carried us to the river, excluding also the third line; but it was proved that the former owner of this land admitted the artificial boundary as laid down in the plot, to be the true boundary of the land.

*Taylor, Judge.*—The natural boundary if it can be ascertained, is to be followed; but if the jury have doubts which is the natural boundary, and are satisfied from the evidence that the artificial boundary was considered by the proprietor as the true one, they may establish it by their verdict.

*Quere de hoc.*

*Miller vs. White.*

**EJECTMENT.** An order of survey had been obtained at the last term, and a survey made; and now it was moved for the plaintiff that a new order be made, and the motion was opposed.

*Taylor, Judge.* A new order is not of course; the court will grant it if the former survey be imperfect, not otherwise. Whereupon the plaintiff's counsel shewed that in the survey returned, a line material to be ascertained had not been laid down in the plat returned; and the court granted the motion.



*Van Norden vs. Primm.*

## Bill in Equity and Demurrer.

**PER curiam**—TAYLOR, Judge.—The act of 1796, ch. 29, directs that the county court on the petition of the widow, may appoint a Justice and three freeholders to allot and lay off to the widow, for the use of herself and children, a year's maintenance out of the stock, crop and provisions of the deceased. The bill states that they allotted her £. 125 in money because the perishable estate had been sold, and now it is objected that the £. 125 paid by the administrator pursuant to this proceeding should not be allowed him against a creditor, because it is not stated to be an allowance out of the crop, stock and provisions. It may be an allowance out of the perishable estate, and at the same time not out of the stock, crop and provisions: as suppose the deceased left neither the effects of other descriptions which in their nature are perishable. In support of the bill it is said, first, that this is a proceeding by a court of competent jurisdiction, and that the money having been paid in obedience to their sentence, the administrator ought to be protected. The county court have decided that ~~the~~ perishable articles constitute a part of this stock, and if they have judged erroneously the administrator ought not to be injured. Secondly, that the word stock embraces other articles beside cattle, hogs, and sheep, and indeed all articles which our law denominates perishable; otherwise it might happen that the widow of a merchant, mechanic, lawyer, or the like, dying in a town would have no maintenance for herself and children, when at the same time, the widow of a farmer not leaving as large an estate would be provided for; and this could not be the meaning of the legislature. I am of opinion the county court have no power to allot a maintenance out of any other part of the estate than the stock, crop and provisions, and that the stock here meant is that which is commonly denominated stock in the country; namely, animals with which the plantations of farmers are usually supplied: this construction is liable to the objection made to it, but it is not for us to legislate.—The Assembly must interfere and give a greater extent to the act before I can persuade myself to make the construction asked for. The consequence of this opinion is, that the county court acted without power in directing an allowance out of the perishable estate only, and the complainant should have appealed. I am further of opinion, from the authorities cited, that the court before, and instead of pronouncing a judgment on the demurrer, may give leave to the party complainant to amend his bill, and to state that matter without which the demurrer would be allowed. The complainant therefore may amend his bill, and I will suspend judgment upon the demurrer till after the amendment.

*Haywood* for the complainant.

*Squires vs. Riggs.*

**EJECTMENT.** Defendant disclaimed part having been permitted to plead after a judgment by default set aside ; and having entered a disclaimer last term after plaintiff had left court. *Stanley* moved for a writ of possession, and that the defendant might pay costs.

*Per curiam*, TAYLOR, Judge. When there is a disclaimer entered, the plaintiff may take out a writ of possession of course ; as to the part defended for and not disclaimed, you may proceed to try. Also if you sue for a moiety you may recover a third, or if for two moieties under different devises you may recover two thirds.

*Thompson vs. Gaylard.*

**THIS** action was brought to recover damages for breach of a contract in writing, promising to pay money, dischargeable however in specific articles.

*Taylor*, Judge. This note is not negotiable and you must prove the consideration.

Whereupon *Martin*, for the plaintiff, called a witness and proved the consideration ; and then a question arose concerning the tender.

*Taylor*, Judge. The money is dischargeable in plank, staves, and shingles ; you must prove a tender of all the articles, not of some, only enough in virtue to discharge the debt. A tender of a certificate for timber lying on the bank of the river, and there inspected is not a sufficient tender ; the certificate is evidence at most, only that lumber had been inspected, not that it was at the place of inspection at the time of the tender.

Hillsborough, October Term, 1801.

— vs. *Wright.*

**PER Curiam**, M'CAY Judge, after argument. If the general issue be pleaded to an action on an assigned bond brought by the assignee, that puts the plaintiff to prove both the execution of the bond and the assignment ; also a bond made before the act of 1786, ch. 4, is not negotiable by that act.

Halifax, October Term, 1801.

*Thompson vs. Allen.*

**BILL** in equity for an injunction against a judgment at law : *Allen* was removed to some distant place unknown to his acquaintances. A third person really interested in the judgment made an affidavit, stating a denial of the matters of equity

contained in the bill; stating also his own interest; and it was insisted upon before Judge Hall that an injunction might be dissolved on affidavits disproving the equity of the bill, especially in a case like the present where the real defendant was not brought into court and the nominal one resided at some place whence his answer could not be procured; and the case of Benton and Gibson was urged whereon injunction was continued on affidavits against the answer of the defendant. It was argued that if the court would continue on affidavits, the same reason required they would dissolve on affidavits also, otherwise the condition of the plaintiff or defendant would be unequal. The case was carried to the court of Conference and there the Judge who had decided Benton and Gibson, was of opinion that case afforded no principle of decision which could be applied to the present. The court of Conference agreed that the affidavit in the present case was sufficient to shew that the deponent should be made a party. They declared, however, that an injunction could not be dissolved but upon the answer of the defendant. What passed in the court of Conference is *ex ratione*.

Cases cited for the deponent—2 H. Ch. P. 227. Foth. 37.  
2 H. Ch. P. 259. Ch. Rep. 209. Cursus Con. 445. 3  
P. W. 255. 2 Bro. Ch. Rep. 15, 182 to 186.

## Wilmington, November Term, 1801.

### *North and Prescott vs. Mallett.*

**C**ASE for money due by two notes of hand payable January, 1784. Payments were made in part by two notes in 1783, also there were several other payments, and in 1785 a payment was made to the amount of the balance of the principal, and an offer was then made to pay any balance which might be then due, if the plaintiff would agree to credit to the amount of the notes, which he refused. It was stated by counsel that a calculation had been made by agreement, and that on the 20th May, 1785, when Mallett offered to close the accounts, 320 dollars & 60 cents were due as interest and not as principal, and to calculate interest on that sum would be giving interest on interest. To support this position he stated, that the mode of calculating interest at the time this contract was entered into, and during the whole transaction, till May, 1785, was to find the interest on the principal sum till the time of settlement, and the interest on the several payments from the day on which they were made, to the time of settlement also, and then to strike the balance. Pursuing this method in the present case, as the several payments made amounted to more than the principal, the balance due on the 20th May, 1785, must certainly be considered as interest merely. And although the rule for calculating interest has been since al-

tered, and that what is here contended for was erroneous in principle; yet as it was the mode in use when the parties contracted and paid, it ought now to be adhered to.

*Per curiam*, HALL, Judge. The payment ought in the first place to be applied to the discharge of the interest accrued, and if a balance of payments remains then to deduct it from the principal. If the plaintiff received the notes as payment the defendant should be credited from the day of the receipt, otherwise it is, if he only made them his by delay and keeping them in his possession. The defendant may stop interest when he pleases by tendering the principal and interest, but it is not a legal tender to say, here I am ready; he must have the money ready also.

*Evans vs. James.*

**EJECTMENT.** The plaintiff derived his title from the will of Jonathan Evans; who devised as follows: "I give and bequeath to my two eldest sons, Reece and David, my plantation, &c.—320 acres on the river to Reece, and 320 acres to David; and they to put to school my two youngest sons, and to school them at their charge."

The plaintiff's counsel contended, that Reece and David took as joint tenants for life, and as David died first the whole life estate went by survivorship to Reece, who was the eldest son of their father, and that on his death the estate in fee descended on Jonathan, the eldest son of Reece, and heir at law of the devisor. It was stated in evidence that David died in 1781. Reece died in 1785, leaving a son Jonathan, who took possession after Reece's death, by putting his stock of hogs and cattle on the land. Jonathan was an infant for many years after Reece's death; the remaining brothers of Reece, and uncles of Jonathan, sold to defendant, James, in 1795. They never claimed title before, nor were they at any time in possession, nor was any person in possession but Jonathan, until James the defendant entered in 1795; an action was brought in 1796. David left a daughter in *ventre sa mere*, who was born four months after his death, and died in 1796. There were two other sons of old Jonathan.

*Jocelyn*, for the plaintiff.—The devisees, Reece and David, were joint tenants. 12 Mo. 302. 1 Salk. 390. 2d. The devisees took an estate for life, only the charge of schooling the two youngest sons is not such an one as will create a fee where otherwise the words would make an estate for life only. Schooling is an annual charge, it is not a sum in gross, for it might be more or less according to future circumstances, as the death of the children, &c. He cited Gilbert on Devises, page 19, and said it was payable out of the profits.

*Wright, e contra.* The devisees took estates in severalty.—All estates are so unless expressly made otherwise; no such expression is here; on the contrary, Reece is to hold 320 acres on

the river, which is a particular designation of the spot intended for him; and the remainder of consequence falls to David: they have no unity of possession so ascerted to a jointenancy. 12 Mo. 320. 1 Salk. 390 support the position laid down by us when compared with the words of our will; besides the construction of deeds and of wills is materially different; the one is construed most strictly against the grantor, the other according to the intent of the testator; that was in our case most evidently to create an estate in severalty or at least in common. As to the next question this is an estate in fee in the devisees; the charge is not expressed to be payable out of the profits. It is expressly said *at their own charge*. He cited Cro. E. 378. 2 Cro. 527. 6 Rep. 16. 2 Lev. 249. Co. Litt. 9, 6. 3 Burr. 1533; all these cases prove that where a charge is laid on the devisee which is not to be paid out of the profits, that he has a fee: here the charge cannot be out of the profits because the plantation is devised to the mother for life; she might have lived longer than the devisees and the schooling must necessarily be delayed by monies of their own.

*Jocelyn* in reply. It is uncertain how much is to be paid—it is not a gross sum.—It may come out of the profits.—It is to be paid annually.—The fee only arises when a sum certain is to be paid. If either of the youngest sons die, or both, the charge fails either wholly or in part; it depends on a contingency whether the devisees will have any thing to pay. There is no intent expressed or to be collected from the will to pass a fee.

*Hall*, Judge. Let the jury give a special verdict.—[They did so, and afterwards he delivered his opinion.]—If the charge is such that the devisee may sustain a loss by paying it, supposing him to have a life estate only, he shall in such case take a fee. Especially in a case like this, where intending an estate for life to the mother he expressly limits a life estate, which shews he knew how to limit for life when he intended it.

*McNeil and Wife vs. the Administrators of Quince.*

THE deceased left a legacy to the *feme*, for which this action on the case was brought. The administrator had been applied to and he said he would pay it as soon as he could sell the *Orton* plantation.

*Wright*, for the plaintiff, cited Cowper 284, 289. 1 Vent. 120. 2 Cro. 602.

*Jocelyn*, *e contra*, cited 5 T. 690. Iredell 209.

*Hall*, Judge. Legacies may be recovered two ways in equity or by petition, and a suit will lie at law upon a promise by executors to pay it. He is under a moral obligation to pay it when he has assets, and that is a consideration. If he promise in consideration of *forbearance*, though there be no assets, that is enough. It will lie against the administrator of the administrator

promising: the sum paid will be applied as if suit had been against the promising administrator.

*Robinson's administrators vs. James Devone.*

**T**HIS was an action to recover a Negro named Peter, who had been sent to the house of the defendant, in the year 1783 or 1784, some two or three years after the marriage of Devone with the daughter of the intestate, where he has ever since continued.

*Hall*, Judge, refused to admit evidence of the intestate's declarations that he had not given the Negro, made in 1796; saying, after declarations of the party shall not be taken to explain his former transactions.

*Wheaton vs. Cross.*

**T**HE plaintiff was in Tennessee; Bell, the witness, had gone beyond sea since the last term.

*Hall*, Judge. The plaintiff's attorney may make affidavit, or the affidavit of any other person may be made to continue the cause.

*J. Spillar Cutlar's administrators vs. James Cutlar's executors.*

**T**ROVER for Negroes which Spillar in 1794 gave by deed to his daughter for life, and by another deed, dated the 8th of February, 1794, to his daughter and her son, *J. S. Cutlar*, for their lives, and the life of the longest liver or survivor, remainder to the heirs of the survivor. Cutlar who had married the daughter, conveyed by deed, dated the 10th of February, 1794, to James Spillar, and covenanted never to claim any property which should come to his wife by purchase or descent.

*Hall*, Judge. Evidence may be given to prove that the deed last mentioned was really delivered on the 8th, and before the deed to the daughter and her son. The date is not of the essence of the deed, and it is not sound, as argued, that Cutlar being a party to the deed and now a plaintiff is therefore estopped to say the contrary of that which appeared on his own deed.—*Vide* 2 Rep. 4—Dy. 307—A pl. 67—Comber 83.

As to the other points, he said, that *heirs of the body* when spoken of chattels, were in some cases descriptive of the person to take, and were words of purchase, not of limitation; but the word *heirs* simply was always a word of limitation, and operated to give the whole property to the survivor, and is here tantamount to executors. There is no difference between saying remainder in fee to the heirs of the survivor, and remainder to the heirs of the survivor. The absolute property was in suspense till the death of one, but upon that death the absolute property immediately vested in the survivor, and was no

longer contingent, and consequently his administrator ought to recover.

*Hay and Cutlar vs. Spillar's executors.*

**SPILLAR** by deed dated the 4th of February, 1791, conveyed to his daughter Elizabeth the Negroes in question, *to hold for and during the term of her natural life.* She afterwards married Tuton, and he by deed conveyed the same Negroes to Hay and Cutlar forever, *in trust for his wife for her natural life, remainder to her heirs.* A witness was called to be questioned whether or not Spillar consented to or encouraged the making of this latter deed. It was objected that this question should not be put to him, for that the answer tended to shew Spillar had parted with his *reversionary interest*; which ought not to be proved otherwise than by deed. Reversions of real estates cannot be passed without deed because they cannot be passed by livery or seizen—2 B. Com. The same reason applies equally to a reversion or remainder of a personal chattel, where the property is in that situation that it may be passed by delivery, that serves as a notorious symbol of the transfer, but the same cannot be said of a reversion.

*Hall, Judge.* The question proposed is proper; a reversion like this may be passed by parol without deed.

The question was asked and the jury found for the plaintiffs. A question was made upon the effect of the first deed, whether it conveyed the absolute property or only for life; but the Judge gave no opinion upon that point: he directed the jury to consider whether the parol evidence satisfied them that Spillar meant by consenting to Tuton's deed to pass his interest, if any he had.

*Quere de hoc.*

*James Spillar Cutlar's administrators vs. Spillar's executors.*

**SEVERAL** of these suits were on the docket; and after judgment had been obtained in two of them; the executors saying these judgments would exhaust all their assets, moved for leave to plead them for the protection of the assets they had in the next suits.

*Hall, Judge,* took time till next day to consider, and then refused the motion.

*Benjamin Williams vs. Susanna Gorman.*

**CERTIORARI.** The plaintiff had obtained judgment in the county court of Onslow, October term, 1800. The defendant obtained a *Certiorari*, returnable to May term, 1801. At November term, 1801, the plaintiff moved that a *procedendo* should go to the county court, by reason that no notice of the *Certiorari* had been given to the plaintiff. The court ordered

that notice might now go, as two terms had not elapsed since filing the *Certiorari*; and that the cause should be put upon the argument docket, in order that the plaintiff may file counter affidavits.

*Smith vs. Estes and Mallett.*

**T**HIS time 12 months, the bill was abated as to Estes, and an order made by the master to take on account.

Judge *Hall* now renewed that order, though it was strenuously urged there had never been a decree to account. He did it he said, upon the ground of the former order; but he considered the practice to be in some cases, that such a reference did not preclude the parties from insisting that he ought not to be decreed to account. And owing to the particular circumstances of this case, he would consider that the reference should not conclude, if the merits were with the defendant; but he would not order that the said reference should not preclude Mallett from insisting that he should not be decreed to account.

*Quere de hoc.*

*Smith vs. Ballard and others.*

**T**HIS was a bill filed in 1788, to perpetuate testimony against 20 persons, or more, who claimed and were seated upon a tract of land of 5860 acres, which plaintiff claimed under an old patent to one Conner.

There was also an amended bill, stating that they had cut down and destroyed the line trees. Twelve of these defendants had died above two terms before the sitting of this present court. At November term, 1800, he (the plaintiff) obtained leave to amend—which order at the last term was enlarged. To the first bill there was a demurter; and now Mr. *Wright* moved upon an affidavit of Mr. *Sampson*, to continue the cause; stating that he intended between the last term and this, to have filed a bill of revivor, to bring in the representatives of the deceased persons, but was prevented by an accident from doing so: objected first, that this cause is discontinued, as the representatives of the dead defendants were not brought in within two terms: Secondly—this testimony may be perpetuated as to the defendants who are in court, and so there is no occasion as to them to wait till the others are brought in; should it be dismissed upon argument as to the defendants who are in court, the others may still be proceeded against by bill of revivor: Thirdly—these defendants have interests totally separate and distinct from the absent defendants; and should a decree be now made, it would affect those only before the court, and not the absent defendants; should the bill be dismissed as to those now before the court, and the plaintiff may revive afterwards as to those who are not



in: Fourthly—that a demurrer according to the practice of the Courts of Equity in this country, need not be set down to be argued—and this the motion for a continuance supposes: Fifthly—should the court grant him a continuance, it ought to be on payment of all costs, as directed by the act of 1779.

*Hall*, Judge, took time to consider, and now at this day decided against all the objections, except the fourth—and the cause was continued without payment of costs.

*Haywood* for the defendants.

*Quere de hoc.*

*Anonymous.*

**T**HIS was a bill in Equity, against the administrators of Gilchrist, and the administrators of Toole, who were sureties of M'Kie for the costs. Jones's death was suggested.

It was insisted by *Haywood* that they should not proceed 'till the administrator of Jones, the other surety, should be brought in.

*Hall*, Judge.—They may proceed against one alone.

*Quere de hoc—Et vide* 3 Atk. 406.

*Campbell vs. Harkston's administrator.*

**T**HIS cause had been heard and a decree made, ascertaining the debt and giving a credit to the amount of the assets, reserving for further consideration the balance of seventy-nine pounds, which it was supposed had been improperly charged to defendant, and the costs. And now a motion was made to have leave to file a supplemental bill.

*Hall*, Judge. The court will expect an affidavit shewing that the assets now intended to be charged were not charged in the former bill, and enough to induce a belief that such assets are in the defendant's hands.

*Bellout vs. Morse.*

**D**EMURRER to this bill because the plaintiff had not set forth that the will was proved and that the executors qualified thereto.

*Hall*, Judge. This is a good cause of demurrer, but the plaintiff's may amend.

*Anonymous.*

**A** REPORT of the master had been filed three terms ago and no exception taken thereto; and now it was moved for liberty to except; and after argument, *Hall*, Judge, gave leave to except, but the exceptions when filed at the next term to be subject to all objections as well to the regularity thereof as to the facts. *Quere.*—For if the exceptions were receivable they

ought to have been received absolutely ; if not receivable they should not have been allowed.

*Mallett vs. London.*

**D**EFENDANT was summoned, as a garnishee, to the county court, in a suit against one for whom he acted as agent. He gave in his garnishment, and judgment was taken against the principal ; on that he particularized some bonds and referred to others, not specifying them. The specified bonds were delivered into court and produced nothing. In the mean time, London, the agent of one of the partners, both of whom were defendants in this action, assigned the bonds referred to, to a creditor of that partner, and lately Mr. London having moved the county court to be discharged from his garnishment ; that motion was refused and he appealed. Since the said appeal he has been examined again in this court, and mentioned the said bonds specially which before were not so specified ; and now the principal question was, whether after judgment, there can be any further examination of the garnishee.

*Hall, Judge.* He did not complete his first garnishment, but something remained to be done.—The second is a continuation of the first, and as if done at the same time with the first ; and as the second garnishment discloses property enough to satisfy the plaintiff's demand there should be judgment for him.

Judgment accordingly.

Newbern, January Term, 1802.

*Den, on the demise of Stringer vs. Philips.*

**E**JECTMENT. Francis Stringer devised thus : After the death of my mother, I give (the lands in question) to Ralph Stringer in fee ; provided, he or his representatives claims within ten years after my mother's death. He came from Europe in the life time of the mother and returned and died before the war, leaving Thomas Stringer his heir at law. He died in 1795, leaving Francis Stringer, the lessor of the plaintiff, his heir at law ; Francis was then in this country.

*Slade* objected to the plaintiff's recovery ; first, because here was a condition precedent, and it is not proved that Ralph claimed within ten years after the death of the mother, therefore the estate never vested in him. Secondly, Thomas became an alien and was so at the declaration of Independence, and could not transmit his lands by descent to the lessor.

*Gaston, e contra.* Those who were not born aliens could not become so by a separation of empire ; and therefore, Thomas held his lands notwithstanding the separation, and could transmit them by descent. Secondly, the claiming within ten years

was not a condition precedent, but a conditional limitation, or a condition subsequent, which if not performed, the heir might enter. Here he did not enter after the ten years though he had sold to Philips. The estate vested immediately on the death of the testator, for the condition was performable by his representative or heirs, which proves the estate vested, otherwise it could not descend to the heirs.

*Johnston, Judge.* The twenty-sixth article of our constitution declares all the lands within the bounds of this state to belong to the collective body of the people; making exceptions in favor of those who had already obtained grants from the king or lords proprietors; which exceptions extend only to those who were parties to that instrument—the *freemen of North-Carolina*. All others are out of the exceptions, consequently all British subjects, and no one who was then a British subject had title to any lands within this state after that period. It will be said, why then confiscate the lands of British subjects? I answer, the confiscation acts considered that some who were then British subjects, might be willing to become citizens, and to join their efforts for the common defence. The Assembly meant to retain, and actually reserved the power of restoring to such *the rights which to them once belonged*, if within the limited time they would apply for that purpose; and with respect to such as did not apply within time, it was proper, and indeed necessary, to appropriate their estates to the common defence; the mode of doing which was pointed out by those acts, without which the property would have remained unused.

*Brown vs. Lone, administrator of Lone.*

THESE points were resolved by Judge *Johnston*.—First; the administrator, on the plea of *plene administravit* need not prove each debt to be due that he paid off; he may prove the payment and the plaintiff may shew, if he can, that the debt was not due. Secondly; If a bond be shewn to the administrator before letters taken out, and he afterwards pays simple contract debts, he shall not be allowed them; notice of the bond debt need not be by suit, a notice by shewing the bond is enough. Thirdly; the practice of proving a simple contract before a Justice of the Peace is of no use; it is *ex parte*, and if the debt be not due, that will not excuse the administrator; if it be due, the want of such proof will not make the payment void.

*Hawks vs. Fabre.*

ATTACHMENT for two hundred and fifty pounds. The bonds produced amount to two hundred and twenty-four pounds. Objected the sums ought to agree, and as they do not they are not the debt sued for, and cannot be given in evidence.

*Johnston, Judge.* The attachment is to compel appearance if the bonds are specified, then no other bonds shall be given in evidence; but if not specified, the declaration may be of bonds within the amount laid in the attachment, and they may be given in evidence.

*Miller vs. White.*

**EJECTMENT.** He claimed under a patent to Nathan Bryant; beginning at a corner tree, thence S. 80, E. 40 poles to *Walter Lane's line*. There was no actual survey; the 40 poles were completed before arriving at *Lane's line*. The second line was with *Lane's line* to his corner, a certain course and distance, but that distance would not have reached the corner. Supposing the line to be drawn from the point of intersection of the first line with *Lane's line*; if the first line extended to *Lane's line*; and if the second line went with *Lane's line* to the corner, then the land claimed by the plaintiff was within Bryant's grant; if the first line stopped at the end of 40 poles, the land in question was not included.

For the plaintiff it was argued, that the description of the first line in the patent referred to two terminations, the end of the 40 poles, and the intersection of *Lane's line*, and one of them must necessarily be rejected. That one should be adopted which would best attain the intention of the grant. The distance is always a very uncertain description, more so than any other, for the measurement was made by chain carriers unacquainted with the business, and in most instances is erroneous; it is not therefore to be resorted to unless all other marks fail; it will be disregarded, if there be a corner tree found in the course agreeing with the description of the tree called for in the grant. It will be disregarded, as also will be the tree itself, if there be a natural boundary, and by the same reason it will be disregarded if the line of another tract be called for, for that is generally capable of being proved and fixed, and is for the most part known to the neighborhood.

*E contra*, it was argued, that though a marked corner or a natural boundary may cause the distance and even the course to be disregarded, a line of another tract would not, for that is very uncertain; it may be further removed than the surveyor suspects, or may be in a different direction; in either of which cases, if the surveyor calls for it, he will be mistaken, and then the error lies not in the distance but in calling for a line which is not where he supposes. There can be no mistake with respect to the existence or situation of a natural boundary. A decision made by Judge *Moore* in this court corresponds with the principles now contended for. If these principles be the proper ones then a line is not equivalent in point of certainty to a natural boundary, and will not be entitled to the same influence which that would, and of

course the first line will terminate at the completion of the distance mentioned in the deed. He cited the case of *Bradford vs. Hill*, in *Haywood's Reports*, where the court would not depart from the course to arrive at a corner tree.

Counsel for the plaintiff. The parties in that case afterwards brought a new ejectment which being tried before Judge *Moore*, at *Halifax*, on the same circuit in which he is said to have given an opinion favorable to the present defendant, and on such second trial he directed the jury to depart from the course and go to the corner called for in the grant.

*Johnston*, Judge. The grant to *Bryant* was made by the king. The surveyor who made out the plat, was his officer; and the grant is to be construed most strongly against him, and in favor of the patentee; and as it is most for the advantage of the patentee that the line shall extend to the line of *Lane's* patent, the grant ought to receive such construction.

Verdict accordingly.

*Blount vs. the Administrators of Porterfield.*

**SIRE** *facias* to have execution of a judgment obtained against *Porterfield*, and amongst other things was pleaded the act of 1789, for barring the claim of creditors if not exhibited within two years. The defendant proved the advertisement required by the act, except as to the public places in the county, but to supply that, it was proved that a paper was printed within the county, and that the advertisement was made in that county.

*Johnston*, Judge. That is equivalent to advertising at other public places within the county, and is therefore sufficient.

*M<sup>r</sup> Kenzie's administrators vs. Ashe.*

**THIS** cause came on again to be tried, and the same evidence given as before. See 1 vol. 502.

*Johnston*, Judge. These parties having entered into a racing contract have submitted to have that contract governed by the rules of racing; and the evidence is, that by the rules of racing such an accident will not excuse the defendant from running, nor save the forfeiture if he neglects to run. The contract is to be performed by running, notwithstanding any excuse which may be offered, and notwithstanding any impossibility which may occur in the mean time.

Verdict for the plaintiff, and judgment.

*Anonymous.*

**TESTATOR** had devised a Negro to his wife and ~~also~~ lands for life; and the executors of the testator sued for the Negro.

*Johnston, Judge.* The words *and also* continue the clause, and the words *for life* refer to all that precedes. She had an interest for life in the Negro as well as in the lands, and there remained a reversion which vested in the executors; and although the next of kin may be entitled to it, yet the executors must distribute it, and must recover in the first instance, in order to that distribution.

Judgment accordingly.

### *Murphy vs. Guion.*

**T**HIS was an action of trespass for means profits, and a new trial was moved for, and on argument having taken place,

*Johnston, Judge,* said—As to the first ground on which it is moved for, namely, that the statute of limitations should have protected the defendant for all but the last three years, it is not tenable. Judge Buller, it is true, has said so, and it has been followed and copied into other books; there is however no adjudged case to that effect, and I do not consider myself bound by the *dictum* of any judge, however respectable. The reason of the thing is against that position. The plaintiff cannot bring his action till after the judgment in ejectment, and possession delivered or obtained in consequence of it. And shall he be barred for not bringing his action in time, when the law itself for that time prohibits the bringing his action? It would be absurd to say so; the direction given to the jury was proper. As to the other ground, evidence has been received and damages given for the cutting down of trees, when no charge for the cutting down of trees was laid in the declaration. Such evidence ought not to have been received although the plaintiff did not object to it. The verdict is therefore improper and unjust, being founded on evidence which was not admissible. He has had a new trial before, but still I think he ought now to have one for the cause alleged. Let the verdict be set aside, but the plaintiff may have a rule to shew cause why the declaration should not be amended;

A rule was accordingly taken, and on the last of the term, after argument, he permitted the declaration to be amended by adding a count for the cutting down of trees, and the defendant to add the plea of *liberum tenementum*.

### *State vs. Haddock.*

**H**E was indicted in the county court of Pitt, for stealing a heifer, the property of Adams, and a bell of the value of ten pence; and he was convicted as to the bell. He moved an arrest of judgment, because it was not set forth whose property the bell was.—The county court arrested the judgment, and the attorney for the state appealed; and after argument,

*Johnston*, Judge, decided the following points:—First; that an appeal will lie for the state where the defendant is acquitted or otherwise discharged upon an indictment, as well as for the defendant who is convicted. Though, he said, were this *res integra*, he should not be of that opinion upon the words of the acts relative to appeals. Secondly; in this case an appeal is as well as a writ of error. Thirdly; the indictment should state in whom the property was, or that it was the property of some person unknown, otherwise he could not plead in bar to another indictment for the same cause. It was, therefore, not informality or refinement within the act of Assembly, but a matter of substance not cured by it.

Judgment arrested.

*Nathan Smith vs. the heirs of Sheppard.*

**T**HIS was a bill for an account brought against the administrators and the heirs of Sheppard, to which the heirs demurred; and after argument,

*Johnston*, Judge, decided. This bill is proper enough, and will prevent circuity of action. The heirs now may insist upon every defence which they would were the executors first sued to judgment and then the heirs.

*Stephenson and others vs. Prescott and others.*

**C**OMPLAINANT died more than two terms ago.

*Johnston*, Judge. The suit is abated, and must be revived by a bill of revivor; but defendant is not entitled to costs upon the abatement, though he would be entitled if after two terms a *scire facias* were brought and the abatement pleaded.

*Blount vs. Stanley.*

**I**T was objected that the deposition offered by Blount's counsel should not be read, because the commission was directed to, and taken in South Carolina by one person only. And by the rules of practice prescribed by the act of 1782, it should be directed to two Justices of the Peace.

*Johnston*, Judge. That clause must be confined to depositions to be taken in this state, there are some counties where there are no Justices of the Peace. If the clause in question extends to all depositions, it would many times happen that the deposition could not be taken at all for want of Justices.

The deposition was read.

*Ward vs. Vickers.*

**T**HIS was the case of a will which had been offered to the county court for probate, and was contested there by some of the next of kin; an issue had been made up in the county court of Lenoir, between some of the next of kin, and the executors who offered it, and the issue was found against the will. At the next court, a devisee who had not been a party before, moved to have a new issue made up, which the county court refused; whereupon the cause was removed to this court: And now it was moved that the cause be dismissed, on the ground that the issue, will or no will, had been once tried, and was not appealed from as the act of Assembly directs, and therefore, after the term, could not be over halled.

*Woods, e contra.* This case came before the court several terms ago, and was solemnly argued, and the court took time to advise, and some of the then Judges afterwards made up a solemn opinion which was drawn out at length, taking notice of all the authorities on this head which could be found, and concluding that the issue should be tried again. There is a way in England of bringing on the probate again in more solemn form as it is called; God. 62—2 Off. Ex. 18, 48—Swiab. 448, 449. Moreover it is against a general principle, to bind any one by a trial without being a party and perhaps not knowing any thing of it. The devisee now moving for a new issue to be made up was not a party to the former trial, and surely he ought not to be bound by the verdict which possibly would not have been as it is had he been a party.

*Johnston, Judge.*—This is too clear a case to admit of doubt. Our courts which receive probates of wills, are courts of record, and therefore, what is done by them is conclusive. The ecclesiastical courts which receive probate in England, are not of record, and therefore what they do may be re-considered. This person should have appealed from the decision of the county court as the act of Assembly directs. I will not say but such a case might be relievable in Equity, if any fraud were used; but it is not proper for this court.

*Quere de hoc.*

**NOTE.**—The opinion alluded to by Woods, was that of Haywood, Judge, shewn to Judge Williams, and approved of by him—and is as follows:

John Ward died, and a paper purporting to be his will, is presented to the county court to be proved: and on an issue made up, there was a verdict of the jury against the paper. Afterwards at another term, one of the devisees named in that paper, moved to have leave to present it again for probate, and had that leave given: whereupon, the party opposed to the probate ap-



peals to this court, insisting that the order for granting such leave was illegal, as the verdict on the issue was conclusive to all persons whatsoever, and particularly to Noah Ward, who was a devisee, and therefore a party in the former trial. It does not appear by the record, nor is it admitted by his counsel, that he was in fact a party on that occasion.

This statement is not made wholly out of the record; for that states only an application by Noah, to exhibit the paper in July term, 1796, and a permission by the court to do so, &c. and an appeal in consequence of that permission. And the question now is, whether this appeal is sustainable? And it is objected that it is not—1st, because it is not an appeal from any final sentence, judgment or order of the court—and 2d, because the verdict of the jury upon the former trial, and the rejection of the paper thereupon, is conclusive as to this devisee. With respect to the first objection, the permission to re-introduce the paper for probate, is a final adjudication of the court upon the point submitted to them—whether by law such will could be re-introduced? and is therefore within the meaning of the act, such a sentence as may be appealed from; for if he had waited till after the trial and verdict, and had then appealed, that would have been an appeal from the verdict, not from the sentence for re-examining the will; and there must have been a trial *de novo* without again arguing the propriety of the court's judgment; else this inconvenience would result, that there must be a trial in the county court upon an issue made up and tried by examination of witnesses brought to court perhaps at a great expence; and after an attendance of all the witnesses at a very great expence also in the Superior Court, when it was not certain that their attendance would ever be necessary, since the question might be decided by the opinion of the court on argument merely.

It is more proper and reasonable to decide that question before any issue made up, than to go to trial at so much expence, in order to give the party an opportunity to take his exceptions to the opinion of the court in the court above.—I think the appeal proper.

As to the second objection, that the former adjudication is conclusive to Noah Ward, who is a devisee, but was not by his guardian or otherwise, a party to the former trial, the case admits of much doubt, and will involve consequences which seem in some measure irreconcilable with natural justice, which way soever it may be determined. If it be decided that such trial is conclusive to all persons, it infringes the rule, "that no person should be condemned unheard, or without having an opportunity to be heard." And by this means may invalid wills be admitted to probate for want of that opposition which parties might effectually make if they were present; or many rejected for want

of the evidence which the parties might produce to support them, had they an opportunity to do so.

On the other side, if no person is bound by the admission to probate or rejection, who has an interest and is not a party, property held under wills and those also who act under them as executors, legatees or devisees, will never be safe so long as any person having interest either as next of kin, or as legatees under a former will, who has not been summoned, are remaining; for they may all come, one after another at different periods of time, and without limitation for a new trial; and indeed they may choose to come then only, when the evidence to support the will, or which caused it to be rejected, is no longer to be had; and what further increases the inconvenience, is, that though the heirs, the widow, the next of kin, and the legatees in the contested property, may be known, yet the legatees in any former will who are concerned in interest, may not be, and frequently are not known so as to be summoned—and indeed, should they be known, they as well as the heirs or legatees in the contested paper, and the next of kin, may be so far removed from the court of the county where the paper is exhibited, that it be impossible to summon them; or they may be removed to places unknown, and for that reason cannot be summoned—shall the probate be delayed till they can be discovered and summoned, and in the mean time, the property be wasted for want of some one to take care of it? Or shall the probate be denied, because it is impossible to summon them, and the property inevitably wasted, and creditors defrauded of their debts? Or shall the will be rejected and an administrator appointed to distribute to the next of kin for such reasons, and the legatees defeated of the bounty intended for them by the testator? Or shall the will be proved, notwithstanding, and established beyond any further controversy, though these persons may afterwards appear with proofs sufficient to overturn the probate in one case, or to support it in the other, had they been produced in time? The laws cannot lose sight of the fundamental principle, “that no person is bound by a decision he could not controvert;” nor should it abandon that useful rule, “*Interest reipublicæ ut sit finis litium.*” They are both of the last importance in the administration of justice; the one is intended to secure justice to every individual; the other to secure that peace of mind which arises from a consciousness of being secure in the enjoyment of his possessions. Neither of them can be abandoned without injury or violence to the whole system of jurisprudence: and therefore the true rule of decision must be in some medium which infringes neither.

Suppose then, we look for it in a rule like this; that a will be proven by witnesses in the presence of the widow, the next of kin, and the heirs, if they can be summoned, and of the legatees of a former will, if known to be summoned, shall be decisive;

but if any of them be in a situation which notoriously incapacitates them to assert their rights, (which will comprehend the case of minors and persons beyond seas) that they shall have a right still to question the validity of the will if they apply for that purpose in a reasonable time; after which it shall be conclusive to them also as having relinquished their right—and that the probate of a will, or the disallowing the probate, shall be subject to the same rule.

Such a rule seems equally to avoid the imputation of an *ex parte* decision, and of leaving property held under wills so long in jeopardy, and obviates objections that may be raised upon either ground—But the question is, can we infer any such rule from existing authorities? For if we cannot, and that fairly too, we cannot make a rule, however convenient and proper it may appear to be now.—I think such a rule may be deduced from them. To discover whether it may or not, it will be proper to take a view of the law of probates as it stood before the time of our first passing any acts of Assembly upon the subject; and then to consider what alterations those acts have made in the old law, either with respect to wills of personal or real estates. With respect to wills of personal estate, when they were admitted to probate in the ecclesiastical court, proceeding by the rules of the canon law, the validity of the will being established by the sentence of the proper forum, could not be controverted, contested or questioned in any other court. 1 L. Ray, 262. Stra. 1. 3 Term, 127. 2 A. B. 421, p. 4. Gil. E. C. 207, 208. But by the common law, the probate was liable to be brought into question, and to be repealed if justice required it, either where it was founded on the oath of the executor singly, if application was made within ten years, or where it was proven by witnesses, if all those who were interested in opposing it were not subpoenaed to be present at the examination; and those not summoned, apply within one year afterwards to be heard against it: 2 Off. Ex. 18. The other old books say, in the presence of all those who are interested, or in their absence if summoned, where it is implied, that if some are not summoned, it will not be conclusive as to them: 2 Ba. Ab. 404. 2 Nels. Ab. 130, sec. 1. Cunningham Verb. Probate. Off. Ex. 48. God. 62. Swin. 449. Woodson's Lect. 330. 2 Bl. Com. 508. Or if it should afterwards be discovered that the will was obtained by fraudulent means or forged: Str. 481, 703. 3 Term, 125. Or that the probate was founded upon a perjury; or that it was revoked; or there is a later will: 1 P. W. 287; which repeal is effected by commission of review or citation; 2 Off. Ex. 48: 3 Term, 125. 1 P. W. 388; or if those who are interested to oppose it, are beyond seas at the time of the probate, and apply to be heard within six months after their return; or if infants apply for a re-examination within one year after their minority

ceases. Thus stood the law with respect to wills of personal estates; when our first act upon this subject was passed in 1715; ch. 45, sec. 2; which directs singly, who shall take probate of wills, not giving any rules to be observed in conducting or receiving proof of wills—and consequently must have intended that the courts which were to take probate under the act, were to be regulated by the law in use before the act, and to have made the cannon law, so far as concerns wills, the standard of decision in all controverted cases. 1777, 2 sec. 62, confines the probate to one only of the courts mentioned in the former act; and 1789 alters the mode of trying a contested will, both of personal and real estates, by submitting the dispute to a court and jury upon issue made up by the court, without altering any other part of the common law. The revocability of the probate, upon proper ground, and its liability to be questioned within the time limited by the canon law, by those who are interested and not made parties to the former contest, is not altered; and therefore in the case of wills of personal estate, the probate is still subject to be repealed or re-examined at the instance of the probate, if he applies for a re-examination within a year after it takes place. With respect to wills of real estates, they were not provable in the spiritual court; but are regulated entirely by the common law; and a probate of them in the spiritual court by the rules of the common law, is *coram non iudice*, and void: Salk. 552. 6 Rep. 25. The devisee must always be ready upon every new contest, to substantiate the due execution of the will: 1 Burr. 429. By evidence which the common law deems competent, the facts resulting from which, is to be collected and found by a jury; 2 Vez. 426; or the will must be proven in a court of chancery, where nothing can be done without the heir is a party plaintiff; and where the heir is a party, and will not acknowledge the due execution of the will, and issue is made up by the direction of the chancellor, of *devisavit vel non*, and sent into a court of law to be tried and determined according to the rules of the common law: upon return of the whole proceedings in favor of the will, the chancellor pronounces it well proven, and orders it to be registered: 3 Bl. Com. 450. 1 Vez. 286. 2 Str. 764. 2 Vez. 456, 460. 1 Vez. 274. 1 Wils. 216. 1 Bro. ch. 99, 350; or when the facts respecting the execution of the will are admitted on both sides and the doubt concerns the law only, it is sent down by the Chancellor to the Judges of the King's Bench, who certify whether it be well proven or not, and thereupon the Chancellor proceeds to establish the will as before mentioned, or rejects the bill. But so strictly do the courts of chancery adhere to the rule of not condemning any one unheard, that if the heir who is deprived of the inheritance by the will is not made a party to the bill for proving the will, although it be stated in the bill that he is not to be found nor any where to be

heard of, the court of equity will not decree the will to be well proven: 2 Atk. 120. The heir may afterwards appear, and shall not be bound by proofs or by a verdict founded upon proofs he could not controvert.

There is no instance in the case of wills of real estates, that ever the maxim was dispensed with. As to any alterations made upon this subject by our acts, 1784, ch. 15, sec. 6, directs that probate of wills of real estates, taken either before or after that act, shall be received as evidence of the devises—but they are not made conclusive evidence, but only presumptive evidence of the devise; for the act also directs that the original shall be produced when there is any suggestion of fraud committed in drawing or obtaining the will, or any irregularity in the execution or attestation: and for what purpose can this be, but to enable the court and jury to decide whether the county court, though admitted the will to probate, so far as it regarded lands or real estates, had acted properly or not—and if it had not, that they might correct what was done amiss, by a verdict and judgment against the probate. Thus a probate of a will of lands, though allowed of by the acts of 1784, had this effect more than it had in the law as it was before—namely, the registry of the will of lands may now be received as evidence, where the original is lost, which perhaps before it could not be: for in the English law, if a mere will of lands and goods were admitted to probate in the spiritual court, that was no evidence of the devises contained in the will, being *coram non iudice*; Salk. 552: and it might afterwards happen upon an issue made up in chancery, that the will as to the devises, might be disproved and disallowed: 3 P. W. 166. 1 Vez. 278. The act of 1784, combined with that of 1789, may also perhaps, have this further effect; that as the court can now make up the same issue of *deviseavit vel non*, that the court of chancery could before, and have it tried by a court of law in the same manner that a verdict in favor of the will upon such an issue made up, the judgment of the court for admitting to probate thereupon, may be equally conclusive with the declaration of the chancellor, that the will was well proven before the act, provided the trial be conducted and the issue made up with the same solemnities as in a court of chancery, all parties interested being parties to the issue: and that part of 1784, relating to the introduction of the original upon trial, operates only upon the cases it could operate upon immediately after its passage, viz. cases of wills proven in common form, without summoning all parties interested, and without the intervention of a jury, which was the usual practice before the act of 1784.—However, whether such a construction may or may not fairly be put upon the two acts last mentioned, it is not very material to the present question, for the party now applying for the examination and another

trial, was not any party to the former issue and trial ; and then whether his case is to be regulated by the rules of a court of chancery as heretofore used, or by rules drawn from the spirit of the act of 1784, he cannot be concluded by the trial already had ; and therefore he is entitled to be heard—for a rejection of a will to the prejudice of a devisee, not a party, is not to be distinguished from the proof of a will against an heir at law not a party, as far as regards the point of being bound or not by the decision and the inviolable maxim of not deciding against a man unheard. I am of opinion that the county court acted properly when they gave leave to Noah Ward to re-introduce for probate ; and consequently that the will ought now to be remitted to them, to be tried upon an issue to be made up under their direction.

NOTE—In December term, 1805, the Court of Conference unanimously decided in the case of Stuart's will, from Pitt county, in the suit, Dickenson and others vs. Spier's Executors, that a will proved in the absence of the next of kin, shall at their instance be re-examined.

## Hillsborough, April Term, 1802.

### *Gober vs. Elizabeth Gober.*

THE defendant had found the plaintiff in a barn, when the latter was about eight days of age. She had kept and maintained him ever since, and claimed him as her slave. She was about 12 years of age when this occurrence happened. The plaintiff was of a colour between yellow and black, and had a prominent nose. After argument,

*Taylor*, Judge, delivered his opinion. I subscribe to the rule that a man's being black, is, in this country, evidence of his being a slave till the contrary be proved, for the reasons given at the bar ; namely, that all the blacks introduced into this country originally were slaves, and whoever being black claims an exemption from that condition, should shew his manumission, or the free condition of his parents, at least of his mother. But I am not prepared to say the same rule applies to *mulattoes or persons of mixed blood* ; for if one of that description be in fact descended from a free woman, he is also free ; and where the fact cannot be proved, the chance of a descent from a free mother is equal to that of his having descended from a slave and black mother, but free father. In such a case, therefore, the conclusion must proceed on probabilities ; and if there are circumstances indicating that the mother was a white woman rather than a black one, the jury should find in favor of his freedom.

Verdict accordingly that he was free, and judgment.

*Critcher vs. Parker.*

ONE part of the racing articles is that Critcher's horse should carry 130 pounds weight. It is incumbent on him to prove that the rider was weighed, otherwise he cannot shew a compliance with the terms.

And for want of proof of this fact plaintiff was nonsuited.

*Alston & Co. vs. Clay.*

THE plaintiff had attached money of the defendant's in the hands of the clerk of the court, which came into his hands upon the return of an execution, in which the defendant in this action was plaintiff. Upon that point the cause was removed to this court, and now came on to be argued.

*Haywood* for the plaintiff. I know not of any decisions in this state upon the subject. We must argue upon the reason of the thing, and by analogy to other cases. I have heard it said that money in the hands of a sheriff, by execution, for the defendant, cannot be attached because he has a precept from the court commanding him to have it before them. But in other cases the money may be stopped in his hands by order of court; for suppose A has recovered against B, and takes execution, then B recovers a less sum against A; the court will direct that he levy of A only the difference between the sum to A, and that due from him. And this the sheriff will be obliged to observe, although the execution commands him to return the whole into the office; why then may not a Judge by his attachment order him to retain the money, or return it into court subject to the attachment? There is no good reason why he may not. The case put is stronger than that now before the court, for here is no order or precept commanding the clerk to pay it even to the plaintiff.— There are cases where the court will direct the money in the hands of the clerk shall be paid, not to the plaintiff, but to some other person, as the assignee for instance, if the plaintiff shall attempt to receive it to his prejudice; or if the plaintiff be entitled to it and the defendant has a judgment against him to the same amount, the court will order it to be paid to the defendant in satisfaction of his demand, instead of levying it of the plaintiff by execution. If all this may be done, why may not the money be stopped in the hands of the clerk, to be liable to the demand of a third person? Mr. Dallas has reported a case where money sued for may be attached in the hands of the defendant, then after the recovery against the defendant, that money, if levied by the sheriff, shall be subject to the demand of the second plaintiff, notwithstanding the precept to the sheriff. Why not also where the attachment is posterior to the recovery? It is alledged that it would be inconvenient to arrest money in the hands of the

clerk, for then he would be compellable to appear before any court to which the attachment should be returnable. This indeed would be some inconvenience to him, but he takes the office subject to all its disadvantages and ought not to complain of them. Let us view the inconveniences resulting to the public, if this cannot be done; they are of vastly greater magnitude than those suggested on the other side. Let us suppose a man trades in this state to a large amount; he owes debts to the amount of ten thousand pounds; there are debts due to him to the same amount; he removes beyond sea, institutes actions here, and gets executions for the money, which the sheriff levies; should the rule prevail which is now contended for, every creditor must lose his debt, though there is enough to pay all; the money cannot be stopped for the purposes of justice, though it be within the immediate power of the court. Why should the act of Assembly be so construed? The words are large enough to embrace every act of garnishees having in their hands *debts, effects, estates*, &c. of the defendant. It makes no such exceptions as that now aimed at; the legislature, had this case been stated, would not have made it. They have used words extensive enough to take in monies in the hands of a clerk, as well as monies in the hands of any other person; and surely the court ought not to make an exception, which when made, lets in the evils and injustice just now pointed out.

Mr. *Burton* replied, and his argument is contained in Judge *Taylor's* opinion.

*Taylor*, Judge. It has been several times decided, that monies in the hands of a sheriff cannot be attached. Those decisions are analogous to the present. They were made on the ground that the judgments of courts of justice should be effectual. Were the monies levied in pursuance of them attachable, they might be defeated. Attachments would be levied on such monies when perhaps the plaintiffs were far distant, and unable from that circumstance to resist the claims made against them; no man would be assured of the effect of his judgment.

Judgment for the defendant.

### *Davis vs. Watters.*

**T**HIS action was commenced by a warrant issued by a Justice of the Peace. It stated the demand to be for an *account*.—Davis's counsel now stated that the account had arisen thus:—That a special agreement had been entered into between the parties, whereby it was agreed that defendant should repair and fit the waggon of the plaintiff for the road, the iron to be found by the plaintiff; that the plaintiff delivered to him iron accordingly, and paid him the price of the work to be done on the waggon; that the defendant did not complete what he had undertaken; but



did part of it only, and used but part of the iron; for the residue of which plaintiff had raised his *account*. He had also included in the account, part of the sum paid being the overplus, above what was answerable to the work done, also for deficiencies in the work.

*Taylor*, Judge, (after argument.) The plaintiff must state in his warrant the nature of his demand, so as to give notice to the defendant of what is intended to be proved against him; and when that is stated he should not be allowed to vary from it. The cause of action now stated, is not an account, but a complaint for non performance of a special agreement, sounding in damages. Admitting what is contended for on the part of the plaintiff, that a demand on a special agreement, where the sum to be recovered does not exceed twenty pounds, is within the jurisdiction of a Justice, it will not avail the plaintiff; for that does not prove that when he sues on account he may claim for non performance of a special agreement.

The plaintiff was nonsuited.

### *Poindexter's executors vs. George Barker.*

THE plaintiff proved the mother of the Negro slave in question was entailed on Poindexter; that an execution issued against him; that the sheriff sold the mother for the life of Poindexter; that Poindexter died; and it was moved on the part of the defendant, that the executors should be nonsuited; the issue in tail, and not the executors being the persons who had the property.— And of this opinion was Judge *Taylor*. Then it was moved, on the part of the plaintiff, to introduce a law of the state of Virginia, where the Negroes were entailed, to shew, that notwithstanding the entail, the property was in the executors, on the death of the tenant in tail; and the printed book of the Virginia laws was offered. It was objected to, because a better evidence would be a copy of the law, certified by the proper officer who had the custody of the original acts; and it was insisted upon, that this objection corresponded with the universal practice in this state for many years past. Judge *Taylor* was of opinion, that the book was receivable; saying, the constitution of the United States declared that the acts and judicial proceedings of every state should be received in all the other states. Upon this, an examination of the constitution and of the law of Congress made in pursuance thereof was had: the law directed that acts of the legislature should be certified under the great seal. Judge *Taylor* said he must be bound by it; and, nonsuited the plaintiff. Mr. *Norwood* moved to have the nonsuit set aside, on the ground of surprize; saying, he had understood ever since the case of *Alston and Taylor* that the printed book was evidence, and it had been admitted in that case. A rule to shew cause was granted.

ed; and now at this day the cause coming on to be argued— Judge *Taylor* desired the counsel to read the case in 1 Dallas 462, where this question had been examined in the General Court of Pennsylvania.

*Taylor, Judge.* If a Judge gives an opinion and afterwards discovers a mistake, he should rectify it as early as possible. If a nonsuit has taken place in consequence of it, he should set it aside. I think the act of congress was not intended to prescribe one mode only of authentication in exclusion of all others; such as were before used in the courts of this state, may be still used. It is better therefore to submit this case to further consideration. At the next term another Judge will be here, and the same question may be made before him as is now agitated. It seems to me the same evidence as would be sufficient, were this cause on trial in Virginia, should be received here. The argument opposed to this is, that no imposition could take place in Virginia, because there the Judges know what the law is; but that here a spurious book might be offered, or a law which is repealed. The answer is: should such an attempt be made, it is almost impossible but that the imposition attempted would be suspected before it could be effected, and the proceedings would be suspended till further enquiry could be made. The bare possibility of such a mischief is no way comparable to that of sending the parties to Virginia in every case to get a certified copy whenever a law of Virginia is to be produced; when at the same time the court has every reasonable assurance that the law is contained in the printed book, it being printed by the public printer, and being a counterpart of the books used in Virginia to shew their laws.

Nonsuit set aside.

### *Walton vs. Kirby.*

IT was moved by Mr. *Cameron* to alter the writ thus: to insert the words, "*who sues for the county as well as for himself*," immediately after the name of the plaintiff. He said the instructions to the person who made out the writ, directed him so to frame it; which instructions were by letter.

*Taylor, Judge.*—Such an amendment would convert a writ in a civil case to a penal action. The court will not aid a prosecutor on a penal act.

The amendment denied.

### *Nash vs. Taylor.*

THE master reported, and exceptions were taken to the report: but the exceptant omitted an exception to the sum of £. 26, with which the defendant, an executor, was charged; and

with respect to which sum, he now offered a record of the county court of Franklin, to prove it had been recovered by him; and the defendant imprisoned by *ea. m.* had broken gaol.

It was insisted for the defendant, that there being such plain proof of the injustice of this charge, that the court would correct it, although this record had not been produced before the master: or if it was the rule on this subject, that evidence could not now be received to impeach this item, because not excepted to, that the court, rather than do injustice, would adopt some mode to let the defendant into the benefit of it, either by postponing the argument of the exceptions, and giving time to go before the master as to this item, or by some other mean.

Mr. *Williams* for the complainant, read a passage from *Harrison*, which stated that no evidence could now be offered which had not been offered before the master.

*Taylor*, Judge.—I sit here to decide according to law; and that not admitting of the evidence now offered, I cannot admit it. If you make a ground by affidavit, for believing that you ought to have an allowance, directions may be given for exhibiting the evidence before the master; but we will in the mean time, proceed on the argument of the exceptions.

### *Wilcox's Executors vs. M'Lain's Executors.*

**I**N 1795, an order had been made, that the complainants give security for costs, or shew cause at the next term.—And no cause having been shewn, nor the security given, it was now moved that the cause be dismissed.

Mr. *Williams* opposed this motion, because at the next term after this order, a *scire facias* had been granted to the plaintiffs, for the defendants to shew cause why this suit should not be carried on by the executors of Wilcox; and no return was taken of this rule: whence it was to be inferred, that the cause had been shewn by them and allowed of.

*Taylor*, Judge.—No cause having been shewn at the next term, the rule became absolute, and the security must be given. A rule must now be made, that the complainants shall give the security on or before the first day of next term, or the cause to stand dismissed as of this term.

It was then moved for the defendants, that the order formerly made for opening the accounts settled by the award complained of and stated in the bill, be set aside, unless cause be shewn to the contrary at the next term; and that there be a rule made for that purpose. The ground of this motion was, that the complaint against the award, stated the getting to possession by Wilkerson, the testator of M'Lain, and the concealment by him from the arbitrators, of an account current belonging to Wilcox, which charged Wilkerson with a considerable sum not al-

lowed to Wilcox by the arbitrators, owing to such concealment. It was said and read from the answer, that this allegation was not true; for that these papers had been laid before the arbitrators; and as this answer had never been replied to, it was to be taken as true. Notwithstanding which, the accounts had been ordered to be opened, and a new account stated.

Mr. *Williams* opposed this motion, saying, here was a decree that the account should be taken; and that a decree could not be reversed but by a bill of review.

The counsel for the defendant argued, that no bill of review would lie but on a final decree. By the British precedents, a petition against this order would be the proper form of proceeding, that had not been used in our courts; and then there was no other mode left but by motion; and as that gave to the other side equal time to prepare for the defence, and equal notice of the point to be argued, as a petition would, it was equally proper for all purposes of justice as a petition was.

*Taylor*, Judge.—A petition is the proper course; and it has been the practice in some instances to proceed by petition. I remember a case occurred at Fayetteville some years ago, where an eminent counsel was concerned, who advised that course, and it was pursued.

Motion refused.

### *Dickens vs. Ashe, Administrator de bonis non of Milner.*

THE master reported a balance against the defendant; and exceptions were taken, and now came on to be argued. The case appeared to be this:—Alston gave two notes to one Swinney, who endorsed to the plaintiff, who put them in the hands of Milner, an attorney, to bring suit on: the master received the evidence of Alston, to prove that he (Alston) had paid the money to Milner. It was objected that Alston's testimony was not admissible to prove that fact: if he established the fact, then he himself was discharged; if he did not, Dickens might sue him and recover. Also it was argued, that this demand of Dickens against Milner, was a demand at law, more especially if Alston was a competent witness; for he could prove by him the receipt of the money by Milner, which would maintain an action for money had and received.

*Taylor*, Judge, (after a lengthy argument.)—If I make a mistake in giving judgment, it cannot be said I have done so *without the assistance of counsel*.\* Much time has been consumed. The witness is competent to prove the fact he was adduced to prove. If he establishes the fact he was adduced to prove, still

\* *Haywood.*

he may be sued by Dickens for the contents of the notes; and this recovery against Milner, effected by his testimony, cannot be given in evidence for him. As to the other point, I admit that no submission of the parties can give jurisdiction to a court; and consequently, submitting to an answer, will not; yet if the court orders an account to be taken, and a report is made and exceptions taken and set for argument, it is too late then to say that the demand is merely legal, and to move for a dismissal of the bill. The cases which have been read, of dismissing a bill after answer, appear to have been where the answer has been brought on upon bill and answer; no case has been offered of a dismissal after a report made in pursuance of an interlocutory decree.

*Quere de hoc.*

*Pinnell vs. McCrawley and McCrawley.*

**EJECTMENT.** Prior to the last term, the counsel for the plaintiff suggested the death of one of the defendants; but the clerk failed to enter it. At the last term a trial was had, and a verdict for the plaintiff. In the vacation after this term, an affidavit was made, that one of the defendants had died before the trial, and that no suggestion of his death had been entered of record.—A *supersedeas* was obtained, and notice given, that a writ of error would be moved for that cause. At this term the plaintiff's counsel produced an affidavit of Mr. Taylor, who acted as deputy-clerk at the time the suggestion was made; stating that it had been made, and that he was directed to enter it, but delayed the entry in order to consult his principal about the form; and it was afterwards forgotten.

And upon this affidavit, the plaintiff's counsel moved for, and obtained, a rule, to shew cause why the suggestion should not be entered *nunc / ro tunc*; which coming on to be argued, the plaintiff's counsel cited 5 Burr. 2731. Cowper, 408, and 5 Term, 577.

Mr. Norwood, for the defendant, insisted that if the amendment moved for, should be granted, still the court should order the plaintiff to pay the costs of the *supersedeas*, and other proceedings preparatory to the writ of error.

Taylor, Judge.—The amendment moved for, is within the principle of the cases cited; and therefore must be allowed. I am of opinion, however, that as the plaintiff was put to costs by this omission, the defendant should pay the costs occasioned by it.

The defendants counsel then moved that the cause should be referred to the Court of Conference.

Taylor, Judge.—It shall be carried to the Court of Conference if the counsel desire it.

Upon which the plaintiff's counsel produced an affidavit, stating that the defendant was in declining circumstances, and praying that he be held to give security for the costs. The Judge thought this reasonable, and directed such security to be given. The defendant declined giving the same, and the cause was not removed.

*Mason vs. Debow and others.*

BILL IN EQUITY.

THE defendant had died, and it was stated to the court that his heirs had been made parties by bill of revivor; that they were infants at the time of the revivor, and had answered; that one of them had now come of age, and was desirous to make a new defence. This cause had been set for hearing some terms ago, and was now moved to be heard by the plaintiff's counsel.

*Taylor, Judge.*—If he will shew by affidavit or otherwise, satisfactorily, that the former answer did not make as good a defence for him as he can now make, the hearing shall be postponed, and he shall be at liberty to put in a new answer; but unless he shews that, the cause shall be heard.

Halifax, April Term, 1802.

*Slade vs. Griffin.*

*MCCAY, Judge.* Admitting the plaintiff's patent covers the whole land, the defendant's title also covers a part of it, and of this part the defendant has been in possession for more than 7 years. The plaintiff has been in possession all along of part of the land covered by his patent, but not in the actual possession of any part within the defendant's deed, and in such case the act of limitations is a bar to the plaintiff.

*Hunter vs. Parker's executors.*

ACTION to recover money won on a race. It was proved on the part of the plaintiff, that the defendant agreed to run a certain horse, to carry weight for age, to run at certain paths, on a certain day. That then the plaintiff remarked something further was to be done; the plaintiff understanding him, said "*I will give bond and security for the money, in case you win it.*" It was then agreed that they should meet the next morning and give bonds and sureties at a certain place by 10 o'clock in the forenoon: the defendant proved he met at the place with his surety before 10 o'clock and staid till 10, and then *declared himself off*

the contract, the other not having appeared by 10 o'clock. Gentlemen of the turf, and of known experience, were examined, whether according to the rules of racing, the plaintiff failing to appear, ready to give bond and sureties by the time appointed, put it in the power of the other to declare himself off: they affirmed that it did. It was proved that the plaintiff had run his horse over the ground at the paths agreed on, on the day appointed for the race.

*McCay, Judge.* The plaintiff cannot recover, owing to the circumstance of his not appearing by 10 o'clock to give the bond and surety he had agreed to give.

Verdict for the defendant.

## Wilmington, May Term, 1802.

### *Swain vs. Bell and Bellune.*

*Johnston, Judge.* The courses of the patent after arriving at Lockwood Folly are described thus: *thence up a creek within the inlet and the westwardly branch to the head; thence north-east to Elizabeth river.* Where there is a natural boundary it must be followed; and if, as here, the next course will lead to a point whereby the land will not be included, but calls for a natural boundary, the course is to be disregarded, and the nearest course to the natural boundary must be taken. As to possession, if a smaller patent be laid on land included in a greater, and the patentee of this smaller part take possession, and that be not interrupted, though possession be taken of other parts of the larger patent, and that uninterrupted possession be continued under the smaller patent for seven years, it will give a title to the possessor.

### *Hostler's administrators vs. Scull.*

#### TROVER FOR A NEGRO SLAVE.

*ET per Johnston, Judge,* after argument. This Negro belonged to John Vernon, after whose death William Vernon sold to Hostler, after whose death Scull got possession; and after the commencement of this action Scull obtained letters of administration on the estate of John; William was not an executor of John, nor obtained letters of administration. And now it is insisted that the sale by William is good, because he was an *executor de son tort*, and that such an executor may dispose of the property. This is a position which cannot be maintained. Shall every vagabond who may get into the possession of a deceased man's property have power to sell it? He may sell, and the wife and children of the deceased be utterly depriv-

ed of the property and its value. If an executor of his own wrong take property and pays debts with it, the rightful executor shall not disturb the purchaser, because could he recover, the property must be disposed of to pay the debt. These letters of administration obtained by the defendant after issue joined in this action, cannot be given in evidence for him in this place, otherwise than to lessen the *quantum* of damages. The plaintiff will be entitled to recover but just damages enough to carry the costs.

Verdict for 5j. and judgment.

*Note.*—In this case in order to prove that William Vernon was authorised to sell the Negroes in question to Hostler, the plaintiff's counsel offered in evidence a paper writing attested by the clerk of the court, and purporting that William Vernon was appointed administrator or *ad colligendum* mentioning the term. The defendant's counsel produced a copy of the minutes of that term, which had been left by the attesting clerk amongst the court records, that made no mention of any letters having been granted that term.

*Per curiam.* This shall be taken as a complete record of that term, having been filed amongst the court papers as a record; what is offered is no record, and cannot be received to add to the record produced.

The plaintiff's counsel then proved by respectable witnesses that in that term an administration was really granted to William, and that he gave bond and surety for his administration: and from hence the counsel inferred and insisted that some part of the record was lost, or that the copy produced was not a true copy; and that the record being lost, that its contents may be proven by the testimony offered, and the paper writing attested by the clerk.

*Per curiam.*—If there were such a record, and it has been lost, the contents may be proved; but here is a complete record disproving the position that any other ever existed; and you cannot prove against it that the record you speak of ever did exist.

*The administrators of Richard Quince,*

V.S.

*The administrators of Ann Ross.*

**JOHNSTON, Judge.** This bond was given in 1764, payable in December, 1764; in 1777 the obligor died; letters of administration issued in 1778, in the month of January; in 1794 the administrator died, and in 1798 new letters were issued to the present defendant. The rule is that after 20 years acquiescence presumption of payment shall arise, but if any circumstances can be offered to account for the delay, these shall hinder the presumption. Now here from 1773 to the first of June 1784, the courts were shut up and the war intervened: after 1784 till 1794,



when there was an administrator, is but 10 years, and from December, 1764, to 10th March, 1773, is but six years, added together 16. After 1794 till the commencement of this action suit could not be brought, because there was no person to be sued; which sufficiently accounts for the delay. So that there is not 20 years of computable time from the period when this bond was payable to the commencement of this action, and the presumption will not arise.

Verdict for the plaintiff.

### *Eagles vs. Eagles.*

**JOHNSTON**, Judge, (after argument.) If a jury in laying off a widow's dower, gives her too much, the heirs may shew this by affidavit to the court, and the court upon a rule made for the purpose, will enquire into it, and set aside the verdict if justice require it. It is true a return of the writ commanding the dower to be laid off is not expressly directed by the act 1784 ch. 22, sec. 9, but it is implied that it shall be returned and filed. How else is the extent of the dower lands to be known, or the court to be satisfied that it has been laid off? On the other hand if the jury lay off too little for the widow, she may disclose it to the court by affidavit, and the court will make a rule, and have it enquired into, and set aside the allotment if there be cause for it. The proper way now, is for the widow to contradict the affidavits filed against her, by other affidavits.

### *Walker vs. Ashe.*

**THIS** was a bill in equity, and the counsel on both sides agreed to leave to the court the whole cause, and not to impanel a jury as to the contested facts. In the course of the hearing, Walker's counsel offered a witness to be examined.

**Johnston**, Judge. He may be examined on an issue tried by a jury, but in no other case.

### *Whitmore vs. Carr.*

**JOHNSTON**, Judge. If a known agent, residing here, of a person residing abroad, sue a man here in the name of his principal, it is well; or if he sue in consequence of a letter written to him, it is well also. Therefore Carr cannot be discharged from arrest; it is legal, and the *habeas corpus* must be denied.

### *Robinson's executors vs. Kenon's executors.*

**JOHNSTON**, Judge. This is an action by one surety against another to recover a proportion of the monies paid for the principal. There is no case to support such an action. That

such action is not supportable was lately decided at Hillsborough. The plaintiff must resort to equity for a contribution or reimbursement.

*Quere de hoc, et vide* 2 Bos. & P. 368 to 274.

### *Gilbert vs. Murdock.*

**JOHNSTON**, Judge. The plaintiff claims under a deed transferring a Negro slave to A, his executors, administrators and assigns forever; provided, that if A died under 18 or without issue, then to the plaintiff. A. died under 18. The absolute property vested in A. and the after limitation is void. Had he given for the life of A. and made a limitation over it would seem as if there was something left to be disposed of after the life of A. Here that is impossible; there cannot be a limitation by deed of the remainder of a personal chattel. The case of Timms and Potter was the limitation of a trust in remainder and that is good.

### *Cutlar and Hay vs. Brown's executors.*

**JOHNSTON**, Judge. An action upon the case for seducing away the plaintiff's slave from his service will lie against executors for the same reason that trover and conversion will. Judgment for the plaintiff.

*Vide* C. Digest Administrator b. 15. Off. Ex. 127, 128. Comp. 375. Toller 360 361.

### *Quintz vs. Quintz.*

**JOHNSTON**, Judge. The report ought to state every thing the reference directs. Here it has not stated the several periods when the money was received, but only that it was received between such a day and such another day. Let it be referred again to make that statement.

### *Smith and others vs. Mallett.*

**JOHNSTON**, Judge. The bill is brought for an account, and the answer states facts from whence it is inferred, and perhaps properly, that the defendant is not liable to account. There has been however a former order to refer to the master to take account, and I will not alter that; for should such a practice be adopted a latter court would always be examining the propriety of what a former court had done. When the report shall be made, and the cause shall come to a hearing, the court will not decree him to pay if they shall deem him not liable to account.

*Smith vs. Murphy.*

**TRESPASS.** *Quare clausam fregit* and *liberum tenementum* pleaded.

The defendant produced in evidence two deeds: The third course of the latter deed called for 42 poles to a corner standing on the other tract. Forty-two poles were completed before arriving at the first tract. If the last line of the second tract should be drawn from the point where the forty-two poles were completed; the land which the plaintiff had obtained a grant for was not within any of the defendant's deeds; but if the line be extended beyond the 42 poles to an intersection with the lines of the other tract, then the land claimed by the plaintiff was covered by the defendant's second deed.

*Per curiam*, TAYLOR, Judge. Where a course and distance is called for, and also a line of another tract, the distance is to be disregarded, if the line called for can be found; if it cannot, you must stop at the end of the distance.

Verdict for the defendant.

*John Coor Pender vs. Coor.*

**TAYLOR**, Judge. The third line of the plaintiff's tract is described in the patent under which he claims, to be *East 177 poles to an oak, thence southwardly along the various courses of the river to the first station.*—The third line it is contended extends to the river, because the river is the boundary called for between the corner of the third line, and the beginning. This as an abstract proposition is true, but then there is evidence that an oak actually stands at the spot where the 179 poles end; and a southwardly course from thence will strike the river at a small distance, and the river from the point where it is intersected by a line from the oak to the nearest part of the river runs southwardly to the beginning. If the line be not stopped at the oak, but is extended to the river, the course of the river from thence will not be a southwardly but a westwardly course till we get opposite the oak, and then southwardly. If the jury believe the oak to have been made the point of termination when the original survey was made, they should make it the boundary now.

Verdict accordingly.

*The administrators of Sarah Neale vs. Haddock.*

**DETINUE** for a negro. Old Mr. Taylor, by deed of gift, gave the negro to his daughter Sarah, reserving the use to himself and his wife, and the survivor. Sarah married Neale. He died, leaving a son, who married and died, leaving a wife

and child: the child died. Old Mr. Taylor is dead, and his wife also. Upon this evidence,

*Harris* insisted that the plaintiff had a right to recover.

*Haywood*, for the defendant, insisted that Sarah, were she alive, would not be entitled to recover, and of course her administrator could not. He argued, that the property of this negro was in Sarah at the time of her intermarriage, though her right to the possession was deferred; and that by the intermarriage, the property vested in the husband. Co. Littleton, 351, says, the marriage is an absolute gift of all chattels, personal, in possession, in her own right, whether the husband survive the wife or not; but if they be in action, as debts by obligation, contract or otherwise, the husband shall not have them unless he and his wife recover them. Here indeed, she is not in actual possession; neither is the negro a chose en action. The evident meaning of this passage is, that the husband is entitled to every thing except choses en action. The word *possession* is here used to signify the opposite of a chose en action, and so as to comprehend every thing which is not a chose en action. We may readily determine what passes to the husband, by ascertaining what is the true idea of a chose en action; which indeed, of late, has been greatly misunderstood; and some decisions have been made by the Court of Conference upon this misconception, which are likely to produce a total alteration of the law upon this subject, and much confusion. The true definition of a chose en action is this: *A cause of suit for any debt or duty, trespass or wrong*: Bro. Tittle, chose en action. In Lilly's Abridgement, 264, it is thus defined: *When a man can bring an action for some duty, viz. debt upon a bond, or for rent or action of covenant, or trespass for goods taken away, or such like: these are choses en action.* Co. Littleton, *ubi supra*, uses that term in the same sense: "But if they be in action as debts by obligation, contract or otherwise." 2 Bl. Com. 397, "All property in action depends entirely upon contracts, either express or implied, which are the only regular means of acquiring a chose en action. 2 C. Digest, 84, "Choses en action are not vested in the husband by the marriage, though he survive as debts upon bond or contract, unless they are recovered." *Terms de ley* chose en action. It is defined to be *when a man may sue for some duty due to him, as debt upon obligation, rent, action of covenant, ward, trespass of goods taken away, beating or such like, and they are called things in action, because he is driven to his action to recover them.* In every one of these instances, the thing to be recovered is money, either as due by express contract, as debt, or by an implied one as damages. A sum of money to be recovered for debt or damages, is indeed a chose en action, and nothing else can be so. A different idea has been affixed to this term by some of the judges. They have supposed from 2 Bl. Com.

389, that all subjects of property are things in action, where the owner hath not the actual possession : whereas, the legal idea is, that every thing is properly in possession which is not a chose in action. Nothing can be a chose in action which the owner by his own act can obtain the possession of without an action : not so of a sum of money due for debt or recoverable for damages. That a chattel detained is not a chose in action, is proven by this, that the husband alone must bring detinue for a detainer before the coverture : also he alone must bring replevin : Bull. 50, 53. F. N. B. 69. 1 Viner, 81, 82. Pl. 10, 85. Pl. 32, 86. Pl. 36, 87. Pl. 39, 89. Pl. 53, 39. Pl. 9. 1 Ba. Ab. 289. 2 Ba. Ab. 46. 4 Ba. Ab. 289. Cro. El. 133, 608. Pl. 9. Vent. 260. Yelv. 166. 2 Keb. 229. Pl. 24. 1 Salk. 114. Pl. 1. 7 Mo. 105. If such chattel detained from the wife, were a chose in action, it could not vest in the husband ; and then he and the wife must join, as they may in all cases where the thing sued for is a chose in action. It is also proved by the case of *Roberts vs. Polgrean*, 1 H. Bl. Re. 535, where it was admitted on all hands, that if the wife was entitled to a vested interest, and not a possibility only, that such interest vested in the husband, though she was entitled to a present right of possession.—All these cases are bottomed upon the principle, that the property of the wife vests in the husband, whether she hath the actual possession or not. What is said in all these cases, is rendered perfectly consistent, if we consider a personal chattel not yet reduced into the actual possession of the wife, as a chose in possession, as contra distinguished from a chose in action : in other words, if we consider every thing to be a chose in possession which is not a chose in action ; then the property detained will belong to the husband ; the remainder of a chattel will vest in him also. But if on the contrary we consider every thing to be a chose in action, which is not actually reduced into possession, then property detained will not vest in the husband, nor the remainder of a chattel : but by thus considering this subject, we overturn all those cases which have with so much concurrence settled, that detinue is to be brought by the husband alone, and that a remainder will vest in him : the law will be totally altered ; and by this new decision, husbands will not be entitled in many cases ; where, by the law as it stood before the decision of the Court of Conference, they would be entitled. Whether it is more proper to adhere to the ancient law, or to adopt that for law which has been so lately decided, is not for me to determine : but it is far more probable that the Court of Conference was mistaken, than those great judges who have preceded them, and who have held a contrary doctrine from as early a period as the law books can furnish up to the present time.

*Taylor, Judge.*—It is perfectly well settled, that the husband

is not entitled to the remainder of a chattel belonging to the wife at the time of the intermarriage.

Verdict for the plaintiff.

*Quere de hoc—Et vide* 1 H. Bl. Rep. 540. *A, by deed gives a term to C, his intended wife, and her heirs immediately after the death of him; A, to hold the same to C, and her heirs, for her and their own proper use forever.*

The court decided that the deed was a present gift to the wife, in case she survived the husband to take effect in possession in that event;—therefore the right to the term was in the husband.

Now here the actual possession was not in the wife, nor was she entitled to it 'till after her husband's death; and yet he was entitled because she had a *vested interest*. It would be immodest and presumptuous in me to oppose my opinion to that of the learned Judge who seems to entertain no doubt: Nevertheless, I would recommend a further consideration of this subject to the other judges; and the more especially, as I once thought as they now do, and have altered my opinion upon a discovery of new lights—and as I trust upon sufficient grounds. It is true the husband in the case cited, had the possession for his life; but if a third person had been tenant for life, there would have been the same reason for giving him the property she had a *vested interest* in. In the case cited, Rooke Serjeant labored to prove that the wife had but a *possibility*; admitting, that if she had a *vested interest*, it would go to the husband. The counsel on the other side, maintained that *such sort of remainders are considered as vested*. But what need of all this struggling, if a *remainder though vested*, does not accrue to the husband?—The bar and court were all in an error if the above opinion be correct.

### *The administrators of Shepard vs. Edwards.*

**DETINUE.** *Taylor, Judge.* A demand is not necessary to precede the action of detinue, and need not be proved on the trial. As to one of the Negroes sued for he was sold by direction of the plaintiffs and by the marshal after the institution of this action to satisfy an execution against the estate of Shepard. It is no answer to say he was in the defendant's possession at the time of the action. There should be at this time a right of possession in the plaintiff otherwise he ought to recover.

Verdict for the defendant.

### *Moye and others vs. ———*

**DETINUE** for a Negro. A. devised to B. several Negroes for his life, and after his death, to his, B's daughters. One of the daughters married, and B. sent the Negro in question to live with her. His other daughters also married, and he sent

some the Negroes to live with each. The husband of the daughter first married died; then B. died, and a division took place under the will, leaving out the Negro in question.

*Taylor, Judge.* All the daughters were entitled in common to the remainder of this Negro. B. could only pass his interest for life to his son-in-law, not that of his daughter. Neither could there be any merger; for the estate in remainder was not correspondent to the estate for life, this latter belonging to the son-in-law, the former to *all* the daughters. Neither did his wife's share in the remainder vest in the son-in-law who died; for a husband is not entitled to the remainder of his wife. Had there been a dowering of the life estate, the husband of the deceased daughter would have been entitled to her share, and the person claiming under him tenant in common with the plaintiff, and could not have been sued by them in this action.

### *Johnston and Wife vs. Pasteur.*

**DETINUE.** On a motion on the part of the defendant for a new trial,

*Taylor, Judge,* gave his opinion. The objection to this verdict is that the husband should have sued alone. The detainer commenced before the marriage. Notwithstanding the great number of authorities which are relied upon in support of the motion, I am of opinion, clearly, that the husband could not sue alone. It is true that he is barred by the act of limitations if he could. In order however that the opinion of another Judge may be obtained I will grant a new trial.

New trial granted.

See the note to the case of the administrators of Neale vs. Haddock.

### *Speight vs. the heirs, devisees and terretenant of Wade.*

**THIS** was a *sci. fa.* against the children of Thomas Wade and Holding Wade, who were the sons of Thomas the testator, to subject the real estate of Thomas the testator, in their hands, to the satisfaction of a debt recovered against his executors. The defendants to the *sci. fa.* pleaded *nothing by descent on the day of the sci. fa. taken out.* The plaintiff replied, *that lands descended or were devised to them.* Demurrer and joinder: the pleadings on the part of terretenants are omitted here, but noticed in the argument, they were to this effect, *that the lands in their possession were not bound by any judgment obtained against the testator in his life time, &c.*

*Haywood,* in support of the demurrer. The plea is nothing by descent on the day of the *sci. fa.*—the replication is, in substance,

that they had lands before the date of the *sci. fa.* by descent; and upon this there is a demurrer. The fact may be, that the lands have been recovered from the heir by some person having a better title, or sold by *fi. fa.* for the debt of the ancestor.— The plea of nothing by descent on the day of the issuing of the writ, was at the common law, a good plea to protect the heir against the action of a creditor of the ancestor.— Ba. Ab. Heir F. 2 Nels. Ab. Pl. 7. Pl. 11. Hob. 248. 3 Lev. 189. 5 Mo. 122. In England this was remedied by the 3 and 4 W. & M. sec. 6. which enables the creditor to reply as the plaintiffs have done here, *that the heir had lands before the writ taken out against him.* That act never was in force here, and the inconvenience of the rule of the common law was remedied by our act of 1789, ch. 39 sec. 3. This act subjects the heir if he has sold, aliened or made over before action brought or process sued out against him. If sold by *fi. fa.* either for the debt of his ancestor or for his own debt, this act leaves him as it found him, under the regulation of the common law rules. In England, where lands could be parted with no otherwise than by the alienation of the heir, for there it could not be sold by execution, such a replication would prove he had received the value; but in this country it proves no such thing; and therefore the replication prescribed by their act is not applicable to such a plea in this state, nor does it shew the heir to be liable. The common law is altered only as far as the act of 1789 alters it, and any replication not given by this act is not a good one. The replication given under our act is, *that the heir aliened, sold or made over before the action against him.* It may be argued, that if the replication be not good, neither is the plea; and that then judgment is to be given on the *sci. fa.* and that the proper judgment upon the *sci. fa.* is that the plaintiff shall have execution against the lands descended. If such judgment is to be given upon the *sci. fa.* for want of a plea, or upon a bad plea, it must be either, first, by the common law; or secondly, by some British statute enforced here; or thirdly, by some act or acts of our Assembly.

First, then, by the common law, the action against the heir was debt in the *debit* and *detinet*; because being chargeable in respect of the land, and he holding that *in jure proprio*, the debt was so also; Plow. Com. 441. Bull. N. P. 5. Rep. 56. Just for the same reason that a husband is charged for the debt of his wife which shall be *in jure proprio*, because he is charged in respect of property which he holds *in jure propria*. The judgment in this action was, that the plaintiff recover his debt, to be levied *de bonis propriis* of the heir, except in one single instance; and that was where he confessed the debt and pointed out his assets by his plea; in which case the judgment was as cited in Plowden 409 *to be levied of the lands specified in the plea and also in the judgment; the whole of which were to be delivered to the plain-*



and until by the yearly value the debt and damages shall be levied. 3 Rep. 12. If after judgment the debtor died, the plaintiff lost his debt, for the bond being extinguished by the judgment and there being then no law for binding the lands by judgment, no action could be on the bond nor any execution on the judgment; 2 Atk. 609. The *binding* of lands by a judgment was not known in the law until after the statute which gave the *elegit*, which will presently be noticed. At the common law, therefore, there was no such thing as binding lands by a judgment, much less in the case of an heir, against whom the judgment was in all cases to be levied, by *fi. fa.* against his goods and chattels, or by *levary facias* of the profits of his lands; except in the single instance, where he discharged his private property by shewing in certainty the assets he had. Plow. 440. C. Digest Pleader. 2 §. 5. Carth. 98.

Secondly; this idea that the judgment is to be against the lands, upon *hæc dicta*, or a bad bad plea, is not warranted by any British act of parliament. It is true some alteration was made in the law by the act of the 18 Ed. 1 ch. 18, which for the benefit of creditors, and to advance the national credit, directed that when a debt should be recovered, it should be in the election of the plaintiff to have a *fi. fa.* or writ directed to the sheriff to deliver to him all the chattels of the debtor and a moiety of his land. In order to promote the views of the legislature, the judges gave a construction to this act which secured the creditor as soon as he obtained his judgment; for they said *the lands were bound* from the day of the judgment recovered; and accordingly the *elegit* was so formed, it commanded the sheriff to deliver a moiety of all the lands the debtor had *on the day of the judgment* or at any time since. This was the first instance of binding lands by judgment. One consequence of it was, that if judgment was against an ancestor and he died, though the heir as at common law could not be sued on the bond of his ancestor, for that was extinguished, yet as the lands were bound by the judgment, and came to him charged with it, he was not as at common law exempt from the debt: but a *moiety* of the lands were liable to be extended as at the death of the ancestor: and he was chargeable not as heir, because no action of debt would lie against him, but as terretenant or holder of the land *already bound* before it came to his possession; in which case the judgment is quite different from that against the heir. The latter is of the lands pointed out by the plea, to be satisfied out of *all* of them which are to be delivered to the creditor as at the common law; the former is for the creditor to have execution of a *moiety* of the lands bound by the judgment; or in other words, the same execution the lands were liable to by the judgment against the ancestor before his death. Cro. C. 298. 2 Atk. 608 609. Carth. 93. Under this statute the *sci. fa.* vs. terretenants began, not be-

fore it. The object of it was to have execution against the lands, of the judgment, which bound them: but it issued only in respect of lands already bound by a judgment; it did not issue in any instance where the lands were not bound by a judgment; nor did it ever issue against a person as heir, but as terretenant only. How was it possible he could be sued as heir, when the bond being extinguished by the judgment, there was nothing to sue him upon? 5 C. Digest Pleader 3. L. 13. Cro. C. 296. Carth. 93. 3 Rep. 12. Then if there be no judgment binding the land there can be no *sci. fa.* against any one, much less against the heir to have execution of that judgment; it is evident no such *sci. fa.* could issue under the act of 13 Ed. 1 ch. 18. Could it issue under any other? The next relative to this subject is that of the 5 Geo. 2, ch. 7, that makes these alterations; namely, that lands shall be liable to all just debts as well as to specialty debts to which the heir is bound, and shall be liable to be sold as personal estates for the satisfaction of such debts. It may be questioned whether under this the binding of lands by judgment was not done away. It was the *elegit* which bound them because it commanded the sheriff to deliver the moiety of the lands which the debtor had on the day of the judgment; but by this act the *fi. fa.* is introduced instead of the *elegit*, and that commands no such thing. The land is now to be sold in like manner as personal estates are sold for the satisfaction of debts. And how is that? Why, liable to be sold if in the possession of the defendant at the time the *fi. fa.* issues; but if fairly sold before that time, not liable. It will be allowed on all hands, that the *fi. fa.* binds only from the teste. It seems fair and logical to conclude, that if lands are to be sold in like manner as personal estates, and if personal estates are only bound by the teste of the *fi. fa.* so also are the lands; and that if a sale of personal estate between the judgment and the *fi. fa.* is good; so also is a sale of the lands; consequently, that the lands are not bound by judgment, even against the ancestor, unless execution issued in his lifetime: and then it follows, that the *sci. fa.* against the heir as terretenant where execution of the judgment against the ancestor is also done away: and that there is no other way in such case to proceed against the heir but upon the judgment as a just debt under this act, which the heir is liable to pay as he is other just debts. Waving this, however, let us admit that lands continued after this act, to be bound by judgment as before: they could only be bound by a judgment against the ancestor, certainly not by a judgment against the executor; for by the act, lands are to be assets for the satisfaction of debts, as real estates are by the law of England, and to be sold like personal estates; they are not to be assets like personal estates also. Being liable as real estates in England are, if no judgment is obtained against the ancestor, they can there only be bound by a judgment to be obtained against the heir: it cannot be pretended they are assets in the

hands of the executor; and consequently are not within the words used in the judgment against the executor, *to be levied of the goods and chattels of the deceased, in his hands*. If not within these words, can any execution warranted by the judgment, extend to them, and cause them to be sold as assets in the hands of the executor? If not to be affected as assets in his hands, what pretence is there for saying that *real assets* descend to, and in the hands of the heir can be affected by a judgment to be levied out of the personal assets of the deceased? There is not a colour of reason for this, and the contrary has been expressly decided in our courts.

If by the statutes, then lands cannot be sold under a *sci. fa.* unless bound by a judgment against the ancestor. Has our act of 1777, ch. 2. sec. 29, made any alteration in this respect? this being the next act on the subject in the order of time.

It directs that all process formerly issuing against goods and chattels, lands and tenements, shall still issue in the same way, and that all which issued against goods and chattels only, should thereafter issue against lands and tenements as well as goods and chattels. It then directs that the sheriff shall sell *personal estate* before the *real estate*. Some have supposed that as since this act, executions which before issued only against good and chattels, are now to issue against lands and tenements also; that therefore the execution which formerly issued upon a judgment against an executor, shall now be issued against the goods and chattels, lands and tenements of the deceased. The executions referred to in the act just cited, are executions issued upon judgments by justices of the peace, which were not allowed to affect lands till the act of 1777: See Davis's Revisal, p. 494.—It would be absurd in the highest degree to say that lands descended and belonging to one person, should be affected by proceedings against another no way interested therein, except to throw the burthen on the lands, and to exonerate the personal estate as far as possible. If after this act, and before the passage of any other on the subject, such an execution had issued, could the land of the heir be sold? No, surely, for the judgment against the executor was not altered from what it was by the common law, "*to be levied of the goods and chattels of the deceased in the hands of his executors*." The act of 1777, contemplates the case of the original debtor still living; it means to confirm the act of George the 2d, and at the same time to make an exception to the generality of its terms; namely, to make *personal estate* the *primary fund*, for the satisfaction of executions; and to give the same power to justices to affect lands by their judgments, as the courts themselves had. As this act however, said nothing about the case of a debtor who died before judgment against him, it became doubtful how his lands could be proceeded against. They could not be proceeded against as in

the hands of a terretenant, because there was no judgment; and, after a judgment against an executor, he seemed to be at the end of his process: for if there were no assets in the hands of the executor, the judgment was of *assets quando acciderint*; and so, no execution could issue 'till assets came to his hands. If, there was judgment against the executor, because there were assets in his hands, he was bound to satisfy the judgment. In no case then of a judgment against an executor, could execution issue against the lands of the heir: most clearly, lands were *not assets in the hands of the executor*, so as to be levied in pursuance to the judgment, to be levied of *the goods and chattels of the deceased in the hands of his executor*. In case of a judgment against the ancestor, the mode of proceeding was plain enough: There is no *binding* of lands therefore under *this act*. The words supposed to work that effect, have a plain reference to another case—that of an original debtor.

The act of 1777, having not provided for the case of a deceased debtor, and the mode of obtaining execution against his lands, it became necessary to make that provision by a new act; and the act of 1784, ch. 11, was made for the purpose. It recites the doubts entertained, whether real estates of deceased debtors, in the hands of heirs or devisees, were liable to the payment of debts upon judgments against the executor or administrator: and without deciding one way or the other, (because estates might be held under such executions, which only the judiciary could properly decide upon,) it directs, that for the future, *no execution should issue before taking out a sci. fa. against the heir or devisee*, to shew cause why execution should not issue against the real estate.

Upon this act, it is strongly contended, that as the heir is to shew cause why the execution should not issue against his lands, that therefore the judgment upon the *sci. fa.* is to be, that *the execution shall issue against the lands*; and consequently, that the judgment against the executor must be such an one as binds the lands.

There is some plausibility in these remarks, but nothing of substance. I would ask, what is the common law judgment against an executor, who has *fully administered*? For this by the act of 1784, is the judgment upon which the *sci. fa.* is to issue; that is a judgment to be levied *quando assets acciderint*. 3 Term, 688: then lands cannot be bound by it, for if they are not assets in the hands of the executor, they never will be, and do not come under the term *quando acciderint*. If they are present assets, they can never be affected, for the executor has fully administered them: the verdict says so. If the only object of the *sci. fa.* is to have execution of the judgment against the executor, it must be an execution which is capable of issuing upon the judgment. Now what execution can issue upon a judgment

to be levied *de bonis testatoris quando*? Scire facias to have execution in all instances hitherto known, prays execution corresponding with the judgment. And here it is manifest, that if the execution issues, it cannot be on this judgment, which is not against the heir, but a third person, the executor; and affects the personal, not the real assets of the deceased. Of consequence, the execution which the *sci. fa.* is to obtain, must issue upon some new judgment to be given on the *sci. fa.* capable of affecting, and which by the terms of it, will affect the heir in respect of the real assets, or the real assets themselves. That it is so is proved by the act of 1789, ch. 30, made to amend the act of 1784, which secures to the purchaser, lands sold, aliened, or made over by the heir before action brought against him. If the judgment on the *sci. fa.* is to have execution on all the lands descended, it will affect this purchaser;—of course there must be a judgment against the heir for the value, and an execution upon that, *de bonis propriis*—It cannot be to have execution of the judgment against the executor. Then, although the heir is to shew cause why execution should not issue, yet if he does not shew cause, there is to be a judgment against him; and that judgment may or may not be against his lands. If it be said the act of 1789, though amendatory of 1784, relates only to the action of debt, and not to the *sci. fa.* letting alone the express words contained in the title of the act of 1789; I would ask, what motive could the legislature have for protecting a purchaser when the heir was sued in debt, and not protecting him if sued by *sci. fa.*? If it be said, it is because of the notoriety by judgment against the executor, the vendee should not have purchased; I answer, the sale may have been before the judgment; and why not then protect him as well in case of the *sci. fa.* as debt? Besides, it was idle for the legislature to do so; for if by judgment against an executor and a *sci. fa.* thereupon, all the lands descended, whether sold or not before that *sci. fa.* could be resorted to by the creditor, would he not always adopt this mode? Would he not always take care to get a judgment against the executor? Of what use then was it for the legislature to say, lands aliened before action, should be secured to the vendee, but not in case of a *sci. fa.*? That is the same as if they had said, he shall be secured and not secured. Such construction is not authorised by any thing in the act itself, and ends in an absurdity: It is against the express words of the act of 1789. There is no doubt but it relates to the *sci. fa.* as well as the action of debt, and proves that there is to be a judgment on the *sci. fa.* not an award of execution only on a judgment already given. Another proof is, that the defendant may plead to the *sci. fa.* and question the justice and amount of the judgment against the executor. If so, it cannot bind his lands nor himself; for if he succeeds in proving the judgment unjust *in toto*, he will be discharged, if in part

he will be made liable for the residue only. How? by an execution on the judgment against the executor? What kind of an execution? For fifty pounds when the judgment is for an hundred? That cannot be. I am apprized of the objection to this reasoning. It will be said the act of 1784, admits of pleading; namely, that the executor has *assets*, or *has wasted or concealed*, and these pleas, if verified, do not cause a reversal or alteration of the judgment, but only charge the executor with the payment thereof; so that the judgment, in truth, remains as it was, and that none but these pleas can be used by the heirs to avoid the effect of the judgment. The answer is, that there was a special reason for mentioning these pleas and not others. They are mentioned where they are for the purpose of directing what should be done for the heir: on such finding he is discharged; and and by the former finding the executor is discharged. This act directs that the plaintiff shall have judgment against the executor; notwithstanding the former finding and judgment. Had it not been for this direction the plaintiff could have recovered of neither. As to pleas which, if verified, operate to the repulsion of the demand of the plaintiff, there was no need to mention *them*, because in such case the plaintiff being entitled to recover neither against the executor nor the heir, there needed no distinctions, as in the case of these pleas that are mentioned. But surely there are other pleas which the heir may make, besides those specified in the act. Suppose the executor pleads payment to a bond which in fact his testator never executed; or suppose the bond was delivered as on escrow, or usurious, or otherwise placed its circumstances in the class of irrecoverable bonds; or suppose he has receipts of payments, and having no assets, nor likely to have any, will not plead or produce them; shall not the heir be suffered to plead such matters in defence of the inheritance? Suppose the executor admits debts which the testator never owed, or which are barred by the act of limitations; shall the heir be bound by his admissions, or not pleading the act? Suppose the debt paid by the heir and an acquittance given, shall he not plead it? Or suppose he has been sued as heir in an action of debt, and paid the value of the lands descended. The heir might plead all these facts if sued in an action of debt; why not when sued in the *sci. fa.*? why put it in the power of an executor to ruin the heir whenever he pleases? as he certainly may if the heir can plead only the pleas mentioned in the act of 1784. Every executor might become owner of the heir's lands whenever he pleased; so might an administrator, by admitting evidences of the debt, to the necessary amount, selling the lands and becoming the purchaser. He certainly may plead whatever in law will evince to the court that he is not liable to the plaintiff's claim, and of course the judgment against the executor is only a contestible, not a conclusive evidence of debt as to him, the heir,

and estops him in no shape whatever; of course cannot be a *lien* upon his lands, and then they cannot be affected but by a new judgment to be rendered on the *sci. fa.* When it is asserted that the *sci. fa.* is not influenced by the act of 1789 the consequence should be looked to, and looking to the consequences these questions present themselves. When the plaintiff has an award of execution on the judgment against the executor, which execution is to be *levied of the lands descended*, and the *fi. fa.* issues, shall it be in the common form? or shall it in words relate to some period antecedent to its issuing? If in the common form, then it binds only the lands in the possession of the defendant at the time of its issuing, in the like manner as it binds personal estate: then what becomes of all the lands aliened before? The plaintiff must lose benefit of them. To prevent this was the act of 1789 made, a title more than three years from the passing of 1784. If the *sci. fa.* is really regulated only by the act of 1784, and if it is to cause execution against the lands themselves; and if that execution is to be against the lands which the heir has when the execution awarded or issued, then it is a good plea to say he has no such lands when execution is claimed by the *sci. fa.* But to return to the subject; if the *fi. fa.* is not to be in the common form, but to have relation back, by what law is its form altered? Giving it a retrospective force? And if it is to have a retrospective operation, to what period does it relate? Does it relate to the time of descent? Then he who holds by a fair purchase under the heir, without knowledge of any debt due from the ancestor to any person, shall lose his land; when if the heir were sued by action of debt he should be protected. By the rule of the common law yet unaltered, unless by the act of 1789, the heir shall not be liable but in respect of lands he held on the day of the writ issued against him, nor the purchaser for lands purchased before. Did 1784 alter this common law? No; it has said nothing of such alteration: shall we then without any law for the purpose, subject lands from the day of the ancestor's death? Who can even buy lands from an heir if this be law? Twenty years hence he may be called upon by *sci. fa.* on a judgment against executors to give up the land for sale: Shall the execution relate to the time of the judgment against the executor?—Then lands sold before, are protected; those sold afterwards, not: this is an arbitrary distinction, unless supported by some part of the common or statute law. The common law made the *extendi facias* against the heir, to relate only to the time of the action commenced against the heir. It is not supported by the common law. The statute law makes no alteration in this respect, unless 1789 is applicable to the *sci. fa.* Shall it relate to the time of the action against the heir by *sci. fa.* as the *extendi* did at the common law? there is some colour for saying this, but even this may be doubted of from the nature of the *fi. fa.* If the executi-

on on the *sci. fa.* relates neither to the time of descent, nor to the time of the judgment against the executor, it relates, if at all, to the time of the date of the *sci. fa.*—and the inevitable conclusion is, that when an heir is sued by *sci. fa.* the object whereof is to have a sale of lands, if he has parted with the lands descended before the date of the *sci. fa.* these lands cannot be subjected, nor can the heir be subjected by *sci. fa.* if, as alleged, the act of 1789 makes him liable to the value in debt but not in the *sci. fa.* which is as they say *in rem* only, and not *in personam*. But surely this consequence is not a legal one; then the proposition it results from cannot be true; and then it is wrong to say the act of 1789 only regulates the process in debt, and not in the *sci. fa.* It regulates both: and then it follows for the reasons before given, that on the *sci. fa.* there is not to be an award of execution of a former judgment, but a judgment *de novo*; either for the value where the heir is liable to that, or against the lands, if he, by pleading, makes that a proper one.—How can the lands be bound by the judgment against the executor, when the heir may sell them at any time before the date of the *sci. fa.*? How shall execution issue against the lands he held at the time of the judgment against the executor, when a purchaser afterwards, and before the *sci. fa.* issued, has a title which cannot be affected by such execution? And when a judgment is given against them, it is not to have execution, but according to the common law form, that the plaintiff recover so much, to be levied of the lands descended to him, and in his possession on the day of the date of the *sci. fa.* If it be asked when it is proper to give the judgment against him *de bonis propriis*, the answer is ready: in all cases where the act of 1789 and the common law require it; that is for the value of lands aliened before action against the heir, and in all cases where he will not specify the assets descended by his plea. But our opponents say, the judgment is to be against the lands, and *in rem*; and that the 4th section of the act of 1784, is a proof of it: for upon two *nihilis* returned, the judgment is to be against the real estate in the hands of such heirs or devisees. Admitting that we are to be governed by the letter, not the spirit of the clause, the execution if it must go against the lands descended, must also go against lands in the hands of the heir; and therefore if he hath sold, aliened, or made over, before the day of awarding the execution, the terms of the execution will not reach them. Then we need not contend any longer, for our plea states we had not any lands by descent on the date of the *sci. fa.*—if we had any before that time, we must have parted with them. This clause also says judgment shall be given; our opponents say execution shall be answered. The letter of this clause suits them no better than it suits us; and if we resort to its spirit, it is this: there shall be the same judgment upon two *nihilis*, as upon service returned; and that shall be



such a judgment as will subject his lands by descent, according to the measure of liability that the standing law subjected them to ; that is to say, all such lands by descent as he had on the day of the date of the *sci. fa.* or action against him, and then the judgment will be levied of his goods and cattels, and of the lands he had by descent on the date of the *sci. fa.* just in the same way as in case of a judgment in debt. Buller 105. Carth. 245 ; or it will be *to be levied of his goods and chattels, lands and tenements* ; in which case only the lands he had on the day of the judgment will be bound. In either case the clause in question will be as effectually complied with as if the judgment should be for the condemnation of the lands which came by descent. The reasons for giving judgment in this form are as strong here as in England. There it was necessary that the final judgment and process upon it should name the lands subject to the judgment, so as to leave nothing in the discretion of the officer, who under pretence of executing a judgment, either ignorantly or designedly, might disturb the rights of third persons : see the form of the judgment in Plow. 439. Now there if the wrong land be extended, the extent might be set aside ; but here if the sheriff be authorised by the execution awarded to sell all the lands descended, or all the lands he had at the time of the judgment against the executor, or all the lands descended and in possession at the date of the *sci. fa.* great mischief may ensue ; for if he is to sell all the lands descended, it may turn out that they are in possession of a *bona fide* purchaser ; either from the heir sold to him by *fi. fa.* If the sheriff must sell, the purchaser must be protected or none will purchase ; the purchaser who is in will have a good title, for none will deny but that the heir may sell before judgment against the executor, as they say, or before the date of the *sci. fa.*—and the last purchaser will have a good title also, having purchased lands of the description of those ordered by the execution to be sold. I would beg to enquire which of these two have the best title ; for between two good titles it is a point, I imagine, of some difficulty to determine which of them has the best. Suppose the judgment and execution to be leviable on all the lands, in possession on the day of the judgment against the executor. What if in the interim it has been sold by *fi. fa.* for the debt of the ancestor ? there will be two owners both equally entitled. Suppose the direction be to sell all lands in possession on the day of the *sci. fa.* and they have been regularly sold since by *fi. fa.* or otherwise, the same inconvenience will arise. To ascertain therefore the very lands to be sold, and to specify them is more necessary here than in England ; of course, means less rigid, to come at this end should not be adopted ; but on the contrary, means equally, if not more efficacious : this can never be obtained by a judgment *in rem.* What inducement has the heir to plead at all, if he can suffer nothing by not pleading. If the defendant pleads

nothing by descent and the fact is, that he has sold, let him answer the value by a judgment *de bonis propriis*. If he has assets on the day of the *sci. fa.* and will not point them out, and therefore the court cannot specify them in the judgment, let him answer *de bonis propriis*. If when the *sci. fa.* is taken out he has assets not then sold, and he will delay by putting in a false plea, and in the interim the lands are sold, let him answer *de bonis propriis*. No injustice in any one supposeable case can be committed by a judgment *de bonis propriis*, where he will not point out the assets. But, much mischief may ensue if we fancifully abandon the well considered rules of the old law, and adopt others not made by the plain directions of any modern act, not tried, nor their consequences known. There is not the least degree of utility in making the final result of a proceeding by *sci. fa.* different from the proceeding by action of debt. The same measure of justice should be obtained whether the one course or the other be pursued. There is not a sentence in any law to the contrary. No purchaser can be injured, nor any difficulty arise by means of a sale, before the teste of the *fi. fa.* if the judgment is to be *de bonis propriis*, and not against the lands; nor can any difficulty arise from not shewing the assets in his hands at that day, if the judgment is not to be tried *de bonis propriis*; whereas if the sheriff is commanded to sell lands generally he may seize mine for yours, or land legally sold, under an idea that it is not, or lands conveyed by the ancestor, under an idea that the conveyance is invalid. To avoid the judgment *de bonis propriis*, the heir will shew the certainty of his assets, and no discretion will be left in the officer, nor the power to commit mistakes to the disturbances of the title of third persons, and to the involving them in law suits.

If there is not to be an award of execution on the judgment against the executor, but a new judgment on the *sci. fa.* as is intimated and indeed expressed in 1784, ch. 11, sec. 4.—Then in case of a bad plea, or no plea to the *sci. fa.* execution is not to issue for selling all the lands which came by descent; but a judgment *de bonis propriis, et detinis et tenementis*, which judgment will affect all the lands he had by descent on the day of the date of the *sci. fa.* as some books say, and I believe correctly; or at least, all the lands, whether by descent or otherwise, which he had on the day of the judgment, rendered.—And then it follows, that if the plea here pleaded by the defendant be not good, there cannot be a judgment against the lands; but if good, to prevent the judgment *de bonis propriis, &c.* it must be avoided by a sufficient replication; one which will shew by the introduction of other matter, that the plaintiff is really entitled to judgment, notwithstanding by the plea it appears *prima facie*, that he is not entitled. The matter introduced by the replication does not shew this; for the heir is not at all events liable,

though he may have had lands before the *sci. fa.* issued : for still he may not in the words of 1789, have *aliened, sold or made over* the same before the *sci. fa.*

The replication admits what the counsel in support of it deny, that the plea is good if demurred upon, and not replied to : and of course, the execution is not to be awarded on the *sci. fa.* to affect lands in possession prior to the *sci. fa.* Why have they replied, lands before the *sci. fa.* if notwithstanding the plea, the lands spoken of in the replication, were liable without the aid of the replication ? If the judgment is to be *in rem*, and is to affect all the lands which came by descent, or which come by descent, and were in possession of the heir on the day of the judgment against the executor ; then saying, that he, the heir, had no land by descent on the day of the *sci. fa.* issued, is not a good plea, because it admits lands before—and there should be a judgment notwithstanding the plea. And indeed there is no utility in his pleading at all ; for according to the opinion endeavored to be supported on the other side, if he fails to plead, the judgment is to be *in rem*, and cannot affect his other property : if he has no assets then, execution will issue against the lands he had by descent ; and if none are found, it is nothing to the heir—the pursuit ends there : if he has sold the lands, and he fails to plead, judgment they say, will be to have execution against the lands ; and thereby not pleading, he induces a judgment *in rem*, and escapes a *replication*, shewing the fact of his having sold, and raises a dispute between the purchaser and the creditor, or between the purchaser and the vendee under the execution. If the *sci. fa.* can only cause execution to issue on the execution against the executor, what process will the plaintiff use to procure judgment for the value of the lands *aliened, sold or made over* before that judgment ? There is none provided by the act of 1784 ; and say they, the act of 1789 has no relation to the *sci. fa.* under 1784. They must resort to the action of debt, and that will afford them a remedy by relation of the judgment to its commencement, and by giving the value of the lands sold before : but if the lands are really bound by law, and liable from the time of process sued out against the heir, and he himself for lands disposed of before, why release him from a part of his liability when sued by *sci. fa.* ? That also should subject him as far as his liability extended ; that is to say, for the value of lands disposed of at any time prior to its commencement, which cannot be done by a judgment against the real estate he had on the day of the judgment against the executor. We know, that as the law stood when the act of 1784 passed, lands were liable which the heir had on the day of process taken out against him : It is now said they are also liable if in his possession when judgment is obtained against the executor ; and it is so said, because the act of 1784 speaks of judgment against the real

estate. That act says, in sec. 2, "If judgment shall pass against the heir, &c. execution shall and may issue against the real estate, &c. in the *hands of such heir*;" and in section 4, "*judgment shall be given against the real estate in the hands of such heir.*" At what time are these lands to be in his hands? Does it say at the time of the judgment against the executor? No. Lands in his hands at the time the judgment in the *sci. fa.* is given. This rendered necessary the act of 1789, ch. 28, s. 8. Admitting then in its fullest extent the proposition laid down by our opponents, that the judgment in the *sci. fa.* is to be *in rem*, or for execution against the *lands*, there is no ground for saying that judgment or execution shall have relation so as to charge the lands in the hands of the heir on the day of the judgment against the executors. And then if the act of 1789 be not amendatory of the proceedings on the *sci. fa.* introduced by 1784, there cannot be any judgment upon the *sci. fa.* against other lands than those he is in his possession of when called upon by the *sci. fa.* and then the plea in this case is a good one, and will remain so until an act amendatory of the proceedings on the *sci. fa.* shall be passed, authorising a judgment in *personam* or *de bonis propriis*, for the value of the lands sold before the date of the *sci. fa.* If the act of 1789 be amendatory of the proceedings on the *sci. fa.* the plea here pleaded is good, as it was at the common law, until it be shewn by the replication that he had lands by descent, which he *aliened, sold or made over* before the date of the *sci. fa.* and in that case the judgment on the *sci. fa.* will not be as they contend *in rem*, but *de bonis propriis tenis et tenementis*. Still more to counteract the idea of a judgment *in rem*, let us suppose a judgment against the executor, and an action of debt against the heir on the same day; and the creditor obtains judgment in the action of debt, the lands are bound by the latter judgment from the date of the writ: Wood's Inst. 630. If then a *sci. fa.* issues, and it binds from the time of the judgment against the executor, what will be the consequence? The lands are bound to both creditors, and if one sells, the lands go bound into the hands of the purchaser. Suppose lands in Virginia or Maryland; they are assets by the law prior to the act of 1784; but if execution can only be awarded against *lands* or *in rem*, the creditor will lose the benefit of these: 2 Vern. 358. 2 C. D. Chancery. 2 G. 1. 1 Vernon, 419. Latch. 234. For these and other reasons, I am forced to believe that there must be a new judgment upon the *sci. fa.* not against the land which the heir had at the time of the judgment against the executor, but against those he had on the day of the date of the *sci. fa.* If he will specify them by his plea; and if he will not, then *de bonis propriis tenis et tenementis*, affecting all his lands, as well by other acquisitions as by descent; and that he is not liable for any lands he had before the date of the *sci. fa.* unless he is made so by a

replication, stating his selling, aliening or making them over before the date of the *sci. fa.* and then that he is liable by a judgment to be levied *de bonis propriis*, &c. This doctrine will compel the heir to plead, and to shew and specify his assets, instead of letting judgment go by default against all the lands descended to him, leaving it to the plaintiff to find them out as well as he can, and disappointing him entirely where he can find none but such as were sold by the heir, before such time as action upon them took place in his favor: and instead of leaving it to the plaintiff and sheriff to decide whether such sales were valid or otherwise, and so to proceed as to disturb the titles or possessions of purchasers, and to render new law suits necessary for settling them. Calling the process directed by 1784, a *sci. fa.* together with the derivative idea of a sale of the lands, has occasioned the incorrect opinion, which I am now combating.—It was called a *sci. fa.* because it had reference to a judgment; it was not called an action of debt, because the evidence of the debt was lodged in the office when the judgment was rendered against the executor; for that is the practice in this country. The judgment is the *gist* and foundation of the action by *sci. fa.*: it is the evidence of the debt, instead of the original evidence so filed away. The *sci. fa.* recites the judgment as a declaration in debt does the bond: like the bond it is evidence of a debt *prima facie*, but not conclusive evidence, as a judgment against the heir himself would be. In all other circumstances, except the name and the evidence of the debt, it is similar in all respects to debt; if not, the action of debt ought not any longer to be allowed of, for it is against reason, that a difference in the name of process should make a difference in the measure of justice, to be obtained when the cause of action is the same in the one case as the other.

*Wood* for the plaintiff.—It is contended in this case on the part of the plaintiff,

1st. That the proper and legal object of the *sci. fa.* in this case, is to obtain an award of execution against the real estate of Thomas Wade, the elder, deceased, upon the judgment obtained in the suit against his executors.

2d. That that judgment is a lien upon such real estate.

3d. That the pleas of the defendants do not traverse or avoid the lien, nor shew any sufficient cause why execution should not be awarded.

These points shall be considered in their order.—And first, that the proper and legal object of the *sci. fa.* is to obtain an award of execution, &c. This proposition is so obviously deducible from the words of the act of Assembly on this subject, (1784, ch. 11.) that it would be deemed unnecessary to discuss it on the part of the plaintiff, were it not that the defendant's counsel has in his argument, distinctly advanced a position directly

the reverse of it; that is to say, that the proper judgment to be given for a plaintiff in such case, is the same which is given in an action of debt against an heir, viz. to recover out of assets, if he specifies them; and *de bonis propriis* of the heir if he neglects to specify, or specifies falsely. On this position, the reasoning of the defendant's counsel in no small measure depends; and from it he deduces the important conclusion, that as the plea of no assets at the time of action brought, is good in action of debt, it must be so in *sci. fa.*

The most complete refutation of this doctrine, as well as the most direct proof of that advanced on that part of the plaintiff, is to be found in the words of the act; which are, "That in all suits at law where the executors or administrators of any deceased person shall plead, fully administered, no assets; or not sufficient assets to satisfy the plaintiff's demand, and such plea shall be found in favor of the defendant, the plaintiff may proceed to ascertain his demand, and to sign judgment; but before taking out execution against the real estate of the deceased debtor, a writ or writs of *scire facias* shall and may issue, summoning the respective heirs and devisees of such deceased debtor, to shew cause why execution should not issue against the real estate for the amount of such judgment, or so much thereof as there may not be personal assets to discharge; and if judgment shall pass against the heirs or devisees, or any of them, execution shall and may issue against the real estate of the deceased debtor, in the hands of such heirs or devisees, against whom judgment shall be given as aforesaid." If these words will admit of any construction, or need any explanation, such construction and explanation will be found in a subsequent section of the same act, which directs, "That when the heirs and devisees of any deceased debtor, or any of them, shall reside out of the state, so that writs of *scire facias* cannot be served on them, and shall have no guardians on which the same can be executed, then and in that case, the sheriff shall return the fact to be so, and another *scire facias* shall issue; on which the same return shall be made if the parties continue to reside without the limits of this state—on which second return, and likewise on every second return, that the party or parties have been summoned, and no appearance shall be made upon such summons, judgment shall be given against the real estate in the hands of such heirs or devisees." Here the act authorises a judgment when the heir resides out of the state, and can have no personal notice, which judgment, if it were to be as the defendant's counsel contends, it ought to be, against his general property and person, would be as unjust and repugnant to every principle of English jurisprudence, as it is reasonable that the land of a deceased debtor should be liable for his debts, notwithstanding the non-residence of the heir.—But what seems

to be conclusive on this point is, that in the precise case in which, according to the doctrine of the defendant's counsel, judgment would be *de bonis propriis* of the heir, *to wit*, his being summoned and making default, the act declares it shall be against the *real estate* of the deceased debtor. But it is objected by the defendant's counsel, that execution cannot be awarded against the lands upon the judgment against the executor, because that judgment is against the personal estate, not against lands which are not within the words of it; and therefore there must be a new judgment to recover, &c.—And it may also be remarked that the act of Assembly speaks of “judgment passing against the heirs or devisees;” and directs that “judgment shall be against the real estate,” &c. as if a new judgment were to be given different from a mere award of execution. To reconcile these expressions in the act, with the doctrine of the plaintiff's counsel, that the object of the proceedings is a mere award of execution, it will be sufficient to observe, that if an award of execution be not according to strict legal definition, a judgment, it is frequently termed so by the most approved writers.

When, therefore, the legislature was speaking of the final decision of the court upon a *sci. fa.* the object and prayer of which are to obtain execution, it might without impropriety or ambiguity, call that decision a judgment. But the meaning of the legislature with respect to the nature of the decision to be given, by whatever name it may be called, is not left to be collected by construction; it is unequivocally expressed in the plainest terms. A judgment is to be signed, but “before taking out execution against the real estate,” *scire facias* is to issue, summoning the respective heirs, &c. to shew cause “why execution should not issue against the real estate for the amount of such judgment,” &c. The thing then proposed to be done, and against which the heir is to be warned to shew cause, is to issue execution against the real estate, for the amount of such judgment, *vis*: the judgment signed in the suit against the executor; and not as the defendant's counsel contends, to render “a new judgment to recover,” &c.

Again: This objection of the defendant's counsel, as well as much of his reasoning on other points, is founded entirely upon the supposition, that the judgment which the act authorises the creditor to sign, is the common judgment against an executor; *to wit*, to recover out of assets now in the executor's hands, or out of those which are hereafter to come to his hands. But what makes such a supposition necessary or even proper? The act authorises the plaintiff to sign a *judgment*, without prescribing the words or form of it, but particularly prescribing its purpose and effect. It is presumed that the words of a judgment ought to be expressive of its effect; and when a new effect is prescrib-

ed, a new and correspondent form ought to be adopted. Upon this principle, the judgment directed in this case to be signed, would be, to recover *nisi* out of the real estate, and not as the objection supposes, out of personal assets: And indeed it is scarcely to be conceived that the legislature would direct the plaintiff to sign a judgment of assets in the hands of the executor, upon that verdict which has just pronounced that he has none; or of personal assets hereafter to come to the executor's hands, when the avowed object of signing the judgment is to obtain execution for the "amount" thereof against the real estate. If it should be objected that no such judgment is actually signed in the present case; it may be answered that the *sci. fa.* sets forth that a judgment was recovered upon the proper finding of the jury in an action against the executor, without professing to recite the words of it.—The pleas of the defendants admit such judgment and finding of the jury, and the court will suppose the judgment to be in the proper form. But let it be conceded for the sake of the argument, that the proper judgment to be signed in such a case, is in the words and form supposed by the defendant's counsel—still the effect of it is pointed out by the legislature; and it is absurd to contend that it cannot have this effect, because of its inappropriate form. This is to invert the legitimate order of reasoning, and to make the substance depend on the shadow.

Secondly.—The judgment signed in the suit against the executor, is a lien upon the real estate. This is deducible from several considerations: 1st.—The legislature has given a *scire facias* upon that judgment, *quare executionem non* against the lands. A *scire facias* is a writ issuing upon matter of record, which is supposed to bind the person or thing against which it is directed. In giving therefore, a *scire facias* upon that judgment, and making the object or prayer of the *sci. fa.* an execution against the land, the legislature has virtually declared that the land is bound by the judgment. 2d.—The practice which has universally prevailed under the act, is a strong evidence of the correctness of this exposition of it. The *sci. fa.* begins by reciting the judgment against the executor, and concludes by praying execution of it against the lands. This would be absurd if the lands were not bound by the judgment, or liable to such execution.—The defendant also, if he has a defence to make, offers it by plea, which often brings upon him a troublesome and expensive process of evidence, that surely might and would be avoided by demurrer to the *sci. fa.* if, in the language of the defendant's counsel, neither the heirs nor his lands are bound by the judgment: and one is at a loss to discover the motive of the defendant's counsel for making any other answer in this case, if he had any confidence in that principle.

Thirdly.—The amendment of this act passed in 1789, ch. 37,



sec. 3, which is to be considered as part of the same act, and is admitted to extend to *sci. fa.* as well as action of debt; provides that lands aliened before action brought, shall not be liable to such execution in the hands of a *bona fide* purchaser; which strongly implies, that before the amendment, they were liable even in the hands of a *bona fide* purchaser before action brought. This position, however, that the judgment against the executor contains a lien upon the lands, is strenuously and learnedly controverted by the defendant's counsel, whose reasoning on that head will be here examined.

It is objected, that the judgment is against the executor, not the heir; affects personal estate, not lands; binds nothing which is not assets in the hands of the executors, and lands are not such assets. This objection has been anticipated in the discussion of the preceding point, to which it was meant to apply equally with the present. It was there remarked that it is wholly founded upon a supposition neither necessary nor admissible, and is in fact an attempt to defeat the positive provisions of a statute by a mere verbal criticism.

Another objection, if it be rightly comprehended, is, that "it has been determined in our courts that "no execution upon a judgment against an executor can bind or be levied on lands." This assertion must be qualified before it can be admitted. It is believed that it has only been determined, that no execution can issue against lands upon such judgment without *sci. fa.* It cannot be conceived that it has been decided that no execution whatever can "bind or be levied" upon the lands. Such a decision would illy comport with the words of the statute, "that execution shall and may issue against the real estate," &c. But it does not follow that because execution cannot issue against the lands upon such judgment without *sci. fa.* to the heir, the lands are not bound. Many cases may be put in which judgments do bind and yet no execution on them can issue without new process. A recognizance binds the lands of the cognizor from the time of the recognizance; a judgment against the ancestor, binds his lands, in the hands of his heir; and a judgment which has been dormant a year and a day binds the lands of the defendant: Yet in none of these cases can execution regularly issue without *sci. fa.* And indeed with regard to the objection these cases are exactly similar to the present.

Again, it is objected to the position which the plaintiff is endeavoring to maintain, that the heir can "plead and question the judgment," which is considered as "another proof that the judgment cannot bind him or his lands." This objection stands on the assumed principle that a thing which can be questioned by plea contains no lien; a principle which cannot be admitted nor as it is believed supported. The balance due to a factor is a lien upon the merchant's goods in his possession and yet this balance

is contestable : and the same may be said of all liens arising out of matters in *pais*.—And if matters of record are not equally open to examination it certainly is not to that circumstance of difference that the lien contained in them is to be attributed. A further source of objection and argument with the defendant's counsel, equally applicable to the two first propositions advanced on the part of the plaintiff is, the absurdities with which they are supposed to be pregnant. It is said "that great mischiefs will ensue if execution is awarded to sell all the lands descended ; or that were in possession at the time of judgment against executor ; or at the time of *sci. fa.*" If to sell "all the lands descended, they may be in possession of a purchaser before action brought, ex. under *fi. fa.*" "And if the sheriff be commanded to sell, the purchaser must be protected or none will purchase ; both purchasers will therefore have good titles." "If to sell those in possession at the time of judgment against executor, they may have been sold in the interim under *fi. fa.* for the ancestor's debt." "If all those in possession at the time of *sci. fa.* and they have been sold by *fi. fa.* the same inconsistencies will ensue." The fallacy of this argument is conceived to be in assuming the principle, that whenever the sheriff is commanded to sell, the purchaser must be protected, or in other words must acquire a good title. This principle it is believed is not correct, and that with respect to the title or interest of any person not a party to the suit, the maxim *caveat emptor*, applies to such a purchaser as well as to one of any other description. If the heir sell the land descended, to a *bona fide* purchaser before action brought, and afterwards to an action of debt upon the bond of the ancestor, specifying the same lands as assets, the plaintiff may have judgment and execution against them, and yet the purchaser cannot be protected. If the heir in action of debt, should point out as assets, descended lands belonging to another, and to which the ancestor never had any claim ; the plaintiff upon such plea, may have judgment and execution against such lands, and yet the purchaser will have no title.—The truth seems to be that a thing may contain a lien to some purposes, and to a certain extent, and not to all. A *fieri facias* as a lien upon the defendant's goods, but it is only against the defendant's own acts. If they are sold upon one execution, and afterwards upon another, the purchasers under both cannot have good titles, although both writs are liens to certain intents. If there be two judgments against the heir in actions of debt, they both bind the assets descended ; but that in which the process first issued shall be first satisfied : Bac. Abr. Tit. Heir, letter in other words, the second judgment in priority is a lien to all purposes except against the first.

So a judgment in a suit against an executor, although it may not contain a lien paramount to all others, and to the destruction of all adverse interests, may, and undoubtedly does, contain one

sufficient to warrant an execution against the real estate of the deceased debtor in the hands of those who being made parties to a *sci. fa.* do not shew good cause to the contrary; or, in other words, do not shew forth some interest paramount the lien.

Thirdly; the pleas of the defendant do not traverse or avoid the lien, nor shew any sufficient cause why execution should be awarded. To the plea of Mrs. Prout, the devisee, there are two objections. 1st. That it is a plea in discharge or protection of her general property, and not in bar of execution against the lands devised. 2d. If it may be considered as a plea in bar of execution it does not refer to the commencement of the lien. That is a plea in discharge or protection of her general property is evident from this; that it is peculiarly (if not solely) appropriated to the action of debt against an heir upon the bond of his ancestor, in which the debt is considered and demanded as the proper debt of the heir, and the general judgment is *de bonis propriis*. But in *sci. fa. quare executionem non*, no plea is necessary to protect the goods of the heir, as no neglect to plead, or false pleading can subject them; Bac. Abr. Heir, H. The broad and unqualified position taken by the defendant's counsel, that "at common law nothing by descent on the day of issuing writ, is a good plea to protect the heir," and the numerous authorities to which he refers are peculiarly applicable to action of debt. But if the plea be considered as in bar of execution, it ought to relate to the commencement of the lien upon the lands in the hands of the defendant. Why in action of debt does the plea relate to the time of action brought? Because that is the commencement of the lien. And if the position of the plaintiff, that the lien in this case arises from the judgment in the suit against the executor, and not from the process against the devisee, be correct, the defendant's plea of no assets at the issuing of process is as vicious as would be the plea of the heir in action of debt that he had nothing at the time of pleading. One difficulty here occurs, which however is not relied upon nor suggested by the defendant's counsel; probably because it was deemed unsubstantial; for his professional talents and erudition, as well as the care he appears to have bestowed upon this cause, forbid the supposition that it was overlooked. The difficulty alluded to is this: the act of Assembly directs that execution shall issue against the real estate in the hands of the heir or devisee; and from the record in this cause it appears that there is none in the hands of the devisee. There seems, therefore, at first thought to be an absurdity in awarding execution against lands in the hands of defendant which appear not to be there. But this absurdity will, it is believed, upon a closer examination, greatly diminish, if not altogether vanish. It is conceived that nothing more is intended by the words "in the hands of the heir," than what is implied in a judgment against assets in action of debt. In that case the

assets against which judgment is rendered, are presumed to be in the hands of the heir; for it is upon the presumption of his having assets that he is chargeable; 1 P. W. 777. But it is no objection to such a judgment, that he is neither in actual possession nor the actual owner of the lands at the time of judgment; for if the heir plead that he has aliened the lands pending the writ, they are notwithstanding liable, and execution will be awarded against them; Bac. Ab. Tit. Heir, F. If the pleadings shew, admit, or imply that the lands were in possession of the heir at or after the time of the lien attaching upon them, they are presumed to remain there until it is shewn that they have been legally disposed of. If in *sci. fa.* upon judgment against executor, the heir should plead that he had aliened the lands *mala fide* pending the writ; or had aliened them since the last continuance, it is scarcely conceivable that such plea would be a bar to execution against them. And it is presumable, that the law will as much consider the lands in the possession of the heir for the purpose of awarding execution against them when his plea admits to shew a case for their exemption, as if it should shew one in which they are expressly made liable.

With respect to the plea of the terretenant, it is obvious that it contains no answer to the *sci. fa.*—it barely denies a lien, not set up nor hinted at by the plaintiff. By not questioning, it is presumed to admit the regularity and justice of the judgment against the executor; and by not denying, it is supposed also to admit the allegation in the *sci. fa.* that Thomas Wade, the debtor, died seized of the lands, and devised them to his four children. These are therefore the very lands or “real estate” against which the law says execution shall and may issue; unless they have been *bona fide* aliened before action brought. If they have been so aliened, or if the defendant has any title or interest which exempts them from execution, his plea ought to shew it. Will it be contended that the lands of which a debtor died seized, and which descend to his heir, cannot be liable in the hands of a terretenant, except they have been bound by a judgment against the debtor in his life time? They may be aliened *mala fide* and fraudulently; they may be aliened after action brought, and even after the heir has by plea admitted and specified them as assets. And yet the terretenant may plead as in the present case, that they were never bound by any judgment against the debtor in his life time. This principle would be at variance with another which forms the basis of the argument of defendant’s counsel, viz: that the proceedings in *sci. fa.* are similar in effect to those in action of debt in which lands descended are bound from the issuing of process against the heir, even in the hands of the terretenant, notwithstanding no judgment has been rendered against the ancestor in his life time. And it is very strongly to be suspected that the defendant’s title is kept out of sight not so much from

the confidence of his counsel in the principles upon which the defence is placed, as from a consideration that the title is too grossly fraudulent to bear examination.

It has been understood by the plaintiff's counsel, that a difference of opinion has prevailed amongst practitioners in the state, on the subject of making a terretenant a party in *scire facias*, upon a judgment against executor; some holding it unnecessary, and others indispensable to join them. Although it is humbly conceived that at this stage of the cause, and upon the case before the court, no question can arise with respect to the joinder of parties; and that with regard to the terretenant, the proper question is not, whether he has been properly or improperly made a party, but whether he has shewn that the lands in his possession are not liable: Yet as the point may present itself, a few observations on it will be submitted. By the law of England, there are two modes of proceeding to obtain satisfaction of a debt due by a deceased debtor, out of his lands: The one by *scire facias*, against the terretenants; the other by action of debt against the heir. The former is adapted to the case of an obligation by matter of record; the latter to that of one *à pais*. In the former, the proceedings are directed against the land itself; in the latter, they are directed against the general property of the heir. The great leading principle in the argument of the defendant's counsel, is, that the proceedings directed by the act of 1734, ch. 11, are analogous to those upon action of debt; whilst it is endeavored to be maintained on the part of the plaintiff, that they have a much greater, and indeed a very close analogy to those in *sci. fa.* If the doctrine of the plaintiff be correct, it is conceived that it cannot be improper to make the terretenant party. In *sci. fa.* upon judgment against the ancestor, although it is necessary, for certain reasons, to make the heir party *as heir*, yet judgment is given against him as terretenant; or in the equivalent language of our statute, "execution" is directed "to issue against the real estate in his hands."—And as the proceedings are against the land, specifically, those in whose hands it is to be effected, or the terretenants must be cited. So our statute seems to consider the heir and devisee as terretenants, and judgment is directed to be given against them in that character—that is to say, execution is to be awarded against the land itself. And as in both cases the proceedings are equally directed against the land specifically, there seems to be equal propriety in making the terretenants parties in both.

*Haywood* in reply. My worthy friend argues that judgment is to be against the lands, because it is repugnant to every principle of English jurisprudence, to subject the general property and person of the heir, upon two *nihilis* returned to a *sci. fa.*—therefore the legislature did not mean it. I beg leave to ask what is the consequence if in England the heir is sued in an

action of debt to ouster. 3 Atk. 345, 356, 2 Atk. 23, will inform us. The plaintiff's demand is satisfied by virtue of a warrant from the exchequer out of his estate. Two *nihil*s against an executor, being equal to service, will subject him *de bonis propriis*: 2 Stra. 1075. Why not also the heir at law?

Again: He argues that the act declares in this very case of a default by the heir, that judgment shall be against the real estate. It does not say lands which he had by descent on the day of the judgment against the executor: and are these to be considered as lands in his hands, which having conveyed before the date of the *sci. fa.* belong to the purchaser? and are secured to him by the express words of 1789, ch. 39, sec. 3; "The lands *bona fide*, aliened before the action brought, shall not be liable," &c. If they are not so considered, then only those lands are liable which he had at the day of the *sci. fa.* and here the plea says he had none on that day: and then the *sci. fa.* if it be *in rem*, is not a fit remedy for the case of lands disposed of before the date of the *sci. fa.* But the truth is, that the judgment to be levied of the goods and chattels, lands and tenements of the heir, is as much a judgment against the real estate, as one condemning the lands which come to him by descent. It is admitted that an award of execution is not strictly speaking, a judgment; and that the act speaks of a judgment to be given on the *sci. fa.* but, say they, it is frequently termed so by the most approved authors. Why shall the legislature be understood in an untechnical sense, when they use a technical term? We are called upon to give an unusual meaning to a word well understood, for the purpose of proving the most uncommon position; namely, that one man's property is bound by a judgment against another: if a new judgment is to be given, the supposition that the lands are bound by the former judgment, is at an end.

The act, say they, directs a *sci. fa.* for the heir to shew cause why execution should not issue against the real estate. Answer: it also says, if judgment shall pass, &c. execution shall issue, &c. Execution is not to issue until the new judgment be passed; and that will never be if the heir can shew the plaintiff's demand to be unjust, or the executor has assets. The amount may be diminished, or he may prove some part of the demand unfounded. This demand, evidenced by the judgment, is just as unsettled, and open to examination, so far as the heir is concerned as the original evidence on which it is founded. And why is the creditor entitled to execution upon one more than the other?

The judgment against the executors, it is said, is not that which was the proper one before the act of 1784, but one correspondent to the effect it is to produce. One effect is to have execution of the proper goods of the executor, if the heir proves assets in his hands: And can such execution issue on a judgment against the lands *nisi*? Again—first prove that the effect

is to bind the real estate ; and I will agree that the judgment shall be correspondent thereto. They say, how can a judgment be signed against an executor, to be satisfied out of personal estate, when the jury find he has none ? Answer—The judgment is described to be signed for two reasons : first—that the executor might be concluded as to the amount : secondly—that he might be subjected to that amount *de bonis propriis*, should the heir prove assets in his hands. The judgment ought to be entered, notwithstanding such finding ; for otherwise on proof of assets by the heir, the creditor must begin *de novo*, or perhaps would be barred by the former suit ; for they say, as to the executor, the judgment must be *calende sine die*. When there are such plain reasons for the direction to sign judgment, must we say it was for the purpose of binding the real estate ? It is argued that if the judgment against the executor is to be according to the form which was in use before the act of 1784, still the effect is pointed out. I would ask what effect ? If they say that of binding the real estate, I answer, whether that be so or not, is not yet ascertained. The *sci. fa.* it is said, “ is to shew cause why execution should not go against the real estate ; and that proves the lands are bound by the judgment : ” I answer, about as much as leading process in the action of debt ; the object and effect of which is to have execution against the real estate, like the *sci. fa.* after judgment.

It is demanded, why if neither the heir nor his lands are bound, do not defendants demur to the *sci. fa.* ? For this reason : that there would be judgment against the heir, to be levied of his goods and chattels, lands and tenements.

They say, that the act of 1789, which is amendatory of 1784, provides that lands aliened before action brought, shall not be liable to the execution ; which is a proof that it was so liable before the act of 1789, and under the act of 1784.—The answer is, that the clause to which this proviso is attached, says the *heir shall be liable for lands sold, &c. before action against him* : will not the same mode of drawing inferences lead to this, that he was not liable at all under 1784 ? The law was so before 1784, and this is a recognition that it continued so afterwards ; and consequently that such lands were not affectable by *sci. fa.* until the act of 1789 provided for it. Besides, their inference is too large, for it takes in land sold before the judgment against the executors—and yet they do not mean to say that such lands were bound by the judgment : was this land subject under 1784 ? If not, protecting it from execution by 1789, is no proof that it was liable by 1784 : and if no proof as to these lands, neither is it as to those sold after the judgment, and before the *sci. fa.*

It has been decided in our courts, in the case of Baker and Webb, (see Hay. Rep. 171) that lands cannot be affected by a judgment against an executor. The case arose before the act

of 1784. It proves, however, what the law was up to 1784; and it is for my worthy friend to shew that the act of 1784 imparted different effects to the judgment in the *sci. fa.* under that act. He argues, that judgments bind lands in many cases where no execution can issue; therefore, though no execution can issue upon the judgment against the executor, it may be that the judgment binds the lands. I answer, it may be; but they have to prove it really is so. Further; can any instance be produced of a judgment originally not capable of execution, which bound lands? It is because they may be seized by execution, that they are appreciated to its satisfaction. A recognizance, judgment against the ancestor, and a dormant judgment, are all of them to be executed by a writ of execution without further process, unless for some intervening circumstance which renders new process necessary. It is not so of a judgment against the executor, which, so far from having a capacity to be executed by the heir, may be averred against in any shape where an averment would be available against the original demand.

It is argued, that though the judgment is contestable and inconclusive as to the heir, yet it may contain a lien against his lands, because a balance due to a factor, is a lien upon the merchant's goods in his possession, and yet the balance is contestable. The answer is—a contract express or implied, sustains the lien, and enables him to retain for whatever may be due; but property is bound by a judgment because the law ordains it; and it does so because the party bound by the judgment has been undeniably convicted of record of owing the debt: It is proper then to lay hold of his goods and lands, that they be not withdrawn from the satisfaction of a debt proved to be due by the highest evidence. Is it equally proper to lay hold of it and bind it, because the plaintiff says, and perhaps very untruly, that the heir is indebted to him, and exhibits against *him* the judgment obtained against the executor, which is equally contestable as a bond or note, or open account? And all this merely because a factor has a lien on the unascertained balance in his hands. I call upon them for a case where lands have been bound by judgment, when the party whose lands were so bound, was not concluded by the judgment. They say the law cares not for the purchaser under its execution, and holds up the maxim, *caveat emptor*. I answer; security, quiet and repose, are its grand objects: and will the law sell lands to A, which are already legally sold to B? To say that it will, and that the purchaser must take care, is to say we invite persons to give their money to the plaintiff for property which they cannot hold. Which is best, to make the heir pay the value in such case, or to let him go clear, and to make an innocent purchaser pay the debt for him, and get nothing but a law suit for his pains? And suppose every person would take care, and not plunge into the quicksands,



which the law, with the assistance of my worthy friend's subtlety, has prepared for their engulfment; then no sale would take place; and must the court do a vain thing in expectation that the occurrence of a wicked one will give it effect?

If the heir, say our opponents, specify as assets, lands which he has held, the plaintiff shall have judgment and execution against them: no, the plaintiff must reply the sale, and will have judgment for the value; if he take judgment upon such plea, it is his own fault; he will never be able to sell his lands, and will lose his debt. So if lands pointed out by the plea which never belonged to him, the plaintiff will say you had not these lands by descent, but others; and for his false plea there will be judgment *de bonis propriis*. Will the heir run such a risque? What they argue is, that the plaintiff is obliged to take judgment against the lands aliened, and is to lose his debt or to procure a purchaser who must of course lose what he purchases. It is the plaintiff's own fault if in the cases last put, he takes judgment against the lands pointed out by the plea.

The plea of Mrs. Prout is not good they say, because in protection of her general property, not of the lands descended. No doubt the plea is bad if the judgment on the *sci. fa.* be *in rem*, and has relation to the judgment against the executor; but it is as certainly good if she is personally bound for the lands aliened &c. before the date of the *sci. fa.*

As to the *sci. fa.* mentioned in Ba. Ab. Heir H. no argument can be drawn from thence applicable to a *sci. fa.* under the act of 1784; for there the heir is sued as terretenant; but under the act of 1784, as *heir*, a terretenant is one who holds lands bound by a judgment; to have them subjected to execution is all he can suffer: not so of an heir; he may suffer a judgment *de bonis propriis* for not pleading. Let it be proved that the judgment against the executor binds the lands of the heir, and that he is sued as a terretenant, and we will admit the analogy between a *sci. fa.* on a judgment against the ancestor, and one on the judgment against the executor. A terretenant is concluded and bound by a judgment; he cannot deny its justice, nor question its impropriety: not so of an heir sued by *sci. fa.* under the act of 1784. There are several instances mentioned in the acts of 1784 and 1789, where manifestly the judgment on the *sci. fa.* is intended to be a judgment *in personam*; which can in no instance be said of a *sci. fa.* against a terretenant. If the lands be sold before the *sci. fa.* or if sold by the guardian, under 1789, sec. 5, "the proceeds of such sales shall be considered as assets &c. in like manner as assets in the hands of an executor after *sci. fa.* as by the act (1784) directed." Will a judgment *in rem* in this *sci. fa.* ever reach these assets? And yet they are to be reached by it; first, by a judgment against the guardian, and if he will not pay it, by a judgment against him *de bonis propriis*. We ad-

mit the plea is not good, if it be a plea in bar of execution, and if such execution relates to the judgment against the executor. But I am not yet convinced, and therefore do not yield to that position. It is a good plea, even if the judgment be against the lands, and relate only to the date of the *sci. fa.*—or if they are affected, only from the time of the judgment: it is only bad if the judgment be *in rem*, and relate to the judgment against the executor. It is also good if the proper judgment be *de bonis propriis*, &c.—for lands sold before the *sci. fa.* or in other words, if the heir, as at common law, be exempt from any judgment if he has no lands when the *sci. fa.* issues, unless he shews some under the act which the heir had before, and which he sold.—“Judgment against the real estate in the hands of the heir;” this phrase, says he, means what is implied in a judgment against assets in an action of a debt against the heir. I rather think its meaning is similar to that of *assets in the hands of an executor*; and there it signifies any assets he had on the day of the writ taken out against him, or after. Assets in the hands of an heir sued in an action of debt, mean assets which he had on the day of the writ sued out against him, or since. Again, if it means what is implied in a judgment against assets in an action of debt against the heir; that is to be a judgment to be levied of the lands specified in his plea, and is always predicated of lands in the heir’s possession on the day of issuing the writ. *Real estate in the hands of the heir* either means at the time of the judgment on the *sci. fa.* or when it issued. If, say they, the pleadings admit lands in possession at or after the time of the lien attaching upon them, they are presumed to remain there. I subscribe to this position, but if not admitted to be in his hands when the lien attached, then they are not presumed to remain there: and here the lien attaches from the date of the *sci. fa.* and at that time the plea says there were not any lands in the hands of the heir. They say if the heir plead an alienation *mala fide* since the last continuance, it would be no bar, and I agree to it: but if it appear he has no lands, and it do not also appear that he sold *mala fide*, or pending the action, it will be a bar.

I shall say but little as to the argument about the plea of the terretenant: no matter what his plea is, if the *sci. fa.* do not state a case adequate to the subjection of his lands; and they do not shew such a case; unless the *sci. fa.* state that the lands came bound into his hands. Here the *sci. fa.* does not even state that the terretenants acquired the lands after the judgment against the executor. If he purchased before the lien upon them attached, that is, as we say, before the date of the *sci. fa.*—and, as they say, before the judgment against the executor, then the heir is to pay the value and the purchaser to be protected.—The *sci. fa.* then should at least shew an alienation after the

Ben commenced ; that brings us to the main question when it commenced. *Curia advisari.*

The court ordered this cause to be transferred to the court of Conference, where *Haywood*, in the absence of *Wood*, argued as before ; and the court took time to advise.

*Miller vs. —*

THE defendant offered his *protest* in evidence.

*Taylor*, Judge.—A protest never can be given in evidence for him who made it ; and it is very questionable whether it may in any case.

*Lane vs. Brown.*

TAYLOR, Judge.—Upon the dissolution of an injunction, it is of course to retain the money in the office, if affidavit be made, stating circumstances which render it doubtful whether the same may be recovered out of the estate of the defendant, should the decree be against him, unless he will give security for its forthcoming on such an event.

Accordingly in this case an affidavit was made to that effect ; and *Taylor*, after very many censures upon the drawer of the affidavit for its prolixity, ordered the money to be retained until security given.

*Pasteur vs. Jones and Ellis's administrator.*

A BILL in Equity had been filed, stating that a lease had been made of certain premises, by the guardian of *Pasteur* to *Jones* ; in which it was covenanted, that the premises should be left in repair ; that the lease had been assigned to *Ellis*, the intestate, and the houses burnt down whilst in his possession, and had not been re-erected. This bill and the subsequent proceedings had been referred to the Court of Conference, which directed the clerk of that court to certify their opinion, that judgment should be entered against both defendants. Upon receipt of this certificate, it was so entered by the clerk and master in court, under the superintendence of the counsel concerned for the plaintiff. Execution issued accordingly ; and no assets of the intestate being found, the sheriff upon the execution as to him, returned, nothing to be found, and a *devastavit*. Execution then issued against both *de bonis propriis*. And Judge *Taylor*, after an affidavit made by the administrator, superseded the execution till the questions made by the affidavit, could be argued in court.

Against the *supersedeas* it was argued, first, That the administrator of *Ellis* was in justice, liable to the whole demand,

notwithstanding the decree made in pursuance of the opinion of the Court of Conference, had made him equally liable ; for whoever takes an assignment of a lease, thereby agrees to stand in the place of the assignor, and to perform all those covenants running with the land, which the lessor had engaged to perform. The lessor may sue either the lessee or assignee ; the former upon his covenant ; the latter upon the privity of estate ; but it is not in his power to discharge the assignee entirely from his liability to the lessee ; and as the lessee committed the breach, he ought to indemnify the lessee who depended upon the performance which the assignee undertook for.

*Taylor, Judge.* I have no doubt but the assignee ought to contribute one half to the discharge of this judgment : my doubt is, whether in equity he can be subjected *de bonis propriis*, by the return of a *devastavit* made by the sheriff, as he may at law. When the argument next comes on, apply your observations to that topic.

Counsel against the *supersedeas*.—This decree is entered either for the money to be levied out of the estate of the intestate, or it is absolute for payment of the money, without saying out of what fund it shall be raised. Indeed every decree in equity against an executor or administrator, is regularly for payment absolutely ; for unless the court has previously ascertained that he has assets, it will make no decree at all against him. Every bill in equity against an executor, must charge him with assets ; or it will not lie. Admit, however, this is a decree to be levied of the goods of the deceased, the court has ascertained that there are assets, or it would not have made the decree. No writ of execution can be used but that under our act of 1787 ; for independent of that act, all decrees being absolute, were enforced by process of attachment, commission of rebellion, and sequestration ; the execution was proceeded against as all others were. The act of 1787, ch. 22, sec. 2, gives the common law execution ; and consequently the same means when issued against an executor for enforcing the judgment, as are used upon similar occasions at law : otherwise, upon the return of *nulla bona*, the plaintiff is at the end of his process, and must lose the benefit of the decree which he had obtained ; and if so, it is but an idle thing to make a decree at all against executors or administrators : they may always procure such a return by concealing from the sheriff the effects of the deceased. It is evident some mode must be adopted after such return, to compel the administrator to produce the assets : And as no other is pointed out by any act of Assembly, it is but reasonable to believe the legislature intended the common law execution should be accompanied with all its incidents ; and amongst the rest, with a capability of being converted into an absolute execution, by a return of *devastavit*. An enquiry by jury might be adopted, as it sometimes

is at law ; but the defendant would reap no benefit from such a mode, more than he would in the way proposed : for if a jury were called, the not discharging himself of assets when the decree was made, will be conclusive evidence of assets at the inquiry, as it would be at law. Their verdict must eventually lead to the same consequence as the return of *devastavit* does. Admitting then, that the decree is for the money recovered to be levied *de bonis testatoris*, the administrator is liable (if he will not produce the assets) to such an execution as he now complains of : but if the decree is for payment of the money, without saying out of what fund, then he is liable at all events ; and he cannot complain, if by a circuitry we have now gotten that absolute execution, which should have issued against him in the first instance. We mean to levy but one half of the sum recovered against him, although we think he is liable to the whole, both at law and in equity. The decree was then produced, and the certificate of the clerk of that court, which fully warranted the decree as entered.

Counsel against the *supersedeas*. To what purpose is this *supersedeas*? Has the execution issued erroneously? Is it not warranted by the decree? Is it not warranted by the certificate? Is any injustice about to be done to the administrator? Our opponents say there are no assets charged in the bill; what then? The most they can say is that the decree is erroneous; and how is that to be rectified? Can it be done on motion? There is no other way of correcting an error in the decree, but by bill of review. If they bring that, the court will correct all errors; they will say this bill is not sustainable in equity, nor the lessee liable, in the first instance: and they will make the estate of the assignee liable in the first instance; and in case he is not sufficient, then the lessee. This court cannot alter the decree upon motion; such an alteration is prohibited by every rule to be found in the books. If they are driven to a bill of review, it will be for our advantage, not only for the reasons before given, but also for another reason, that a bill of review will not lie, till they have performed the decree.

*Taylor, Judge.* Let it be referred to the court of Conference to decide whether it was their *intent* to charge the defendant personally, or not.

*Quere de hoc*, for if decrees entered of record may be corrected after execution issues, by the remembrance of the Judges who passed them; being always subject to such correction, they can never become final, and we shall never know by seeing the record, what it means. *Vide Wyatt's Register*, 96, 97, 155. I suppose the effect of this suspension was that whilst the cause depended in the court of Conference, for them to consider how far they meant to charge the administrator, that the lessee was compelled to pay all.

*Keais vs. Sheppard's heirs.*

**C**ASE upon a note—plea, that the administrators have assets ; demurrer and joinder. In support of the plea was cited 2 Re. Com. 340.

*Taylor*, Judge. The plea is good, and the demurrer must be over-ruled ; but you may, if you please, withdraw the demurrer and reply. Which was done accordingly.

*Quere* of that part of the decision which holds the plea good. The heir ever since 32 Geo. 2, ch. 7, may be sued upon a note or open account as well as upon a specialty ; and he can no more turn the plaintiff around by a plea of assets in the executor's hands, than he could if sued for a specialty debt before that act. The words of that act are, "The houses, lands, and "other hereditaments and real estates, situate &c. shall be liable "40, and chargeable with all just debts, duties and demands, of "what nature or kind soever, owing by any such person, to his "majesty, or any of his subjects, and shall and may be assets "for the satisfaction thereof, in like manner as real estates are "by the law of England liable to the satisfaction of debts due by "bond or other specialty," &c. As to applying the personal estate first, there never was such a rule at law ; for there the creditor was allowed to sue which of them he pleased first ; I mean the executor or heir. 2 Atk. 426.

*Glasgow vs. Hamilton.*

**T**HE plaintiff stated, that he was distressed in mind, and whilst in that situation, Hamilton's agent presented him with an estimate of an old debt, which he signed, and upon which Hamilton sued him and obtained execution ; and that Hamilton had charged a large sum for interest, which should not have been charged, and omitted to give credit for a considerable sum he had received.

The cause came on to be heard on bill and answer, and the court relieved the plaintiff as to both parts of his complaint, but took time to consider as to the costs ; and on the last day of the court ordered the plaintiff to pay them ; saying, Hamilton ought not to pay for the plaintiff's *perturbations*, though the counsel for the plaintiff insisted vehemently that Hamilton ought to pay for his *injustice* in not giving credit, and for persevering in a demand of interest which he was not entitled to.

N. B. Surely costs ought to be laid upon him who does injustice, rather than upon him whose fault is that he has not been enough suspicious ; in other words, upon guilt rather than simplicity.

*Mourning vs. Davis.*

**T**HIS cause came on to be heard, on bill, answer, and depositions, without a jury, which was dispensed with by consent.

*Haywood*, for the complainant, offered the evidence of a witness then present, and prayed that he might be sworn; this was objected to, and it was said that Judge *Johnston* at last Wilmington court, would not receive such testimony offered by *Haywood*, in the case of Walker and Ashe. It was answered, it was true Judge *Johnston* would not receive it, nor recognize the practice as stated by the counsel offering it; which was, that a witness may be summoned to give testimony in equity, as well as at law; but that the party summoning him, must pay the costs of his attendance. It is equally true, however, that in the case of Blount and Stanley, in this court, a witness was offered and objected to by *Haywood*, and that Judge *Johnston* did receive him, and founded his decree upon that testimony.

*Taylor*, Judge. I will not alter the practice, and the witness must be sworn, but I can perceive that cases may happen, where its reception will be attended with inconvenience: as where a witness is produced, to swear to a material fact, which had not been sworn to before, the other party is taken by surprize; and perhaps had he been apprized in time, he would have disproved it, or discredited the witness.

The evidence was received, and a decree founded upon it.

Hillsborough, October Term, 1802.

*Young, Miller, & Co.*

vs.

*Farrel, administrator of Jordan.*

**A**CTION of debt on a bond; and amongst other things, the defendant pleaded, fully administered, and the act of 1715. Replication and issue.

The plaintiff proved on the first plea, that after the debt contracted, Jordan gave Negroes to his daughter, married to Farrel, and that Farrel sold them before his death: and as to the second plea, the plaintiffs counsel insisted that the act was not in force, or if it was, that it did not run on, until plaintiffs had it in their power to sue; which in fact they had not till 1796; for in that year was the first recovery effected by persons who, like them, had been attached to the British nation during the late war.

*E contra* it was said, that the replication as here entered, without the word, special, preceding it, was to be taken according to

the practice of our courts as a general replication, denying the truth of the plea under the act of 1715, and that no evidence could be given of any special fact to avoid the act, such as disability to sue, &c.

*Hall, Judge.* As to the evidence in the first place, it cannot be regarded by the jury; they have nothing to do with it: And as to the replication, the act of 1715 is in force; the jury are to say whether the act bars the plaintiff's claim.

From this charge, the reporter inferred the opinion of his Honor to be, that the replication thus entered was to be considered as a general one, denying the matter of the plea, and not as introducing any new matter by way of avoidance.

### *Williams vs. Williams.*

**H**AYWOOD moved for leave to amend the answer; and insisted it was agreeable to the practice, and had been done in many instances.

*Hall* took time to advise; and the cause of Wilcox's executors vs. M'Laine coming on in the mean time, in which was read an amended answer; he said, at another day the answer may be amended.

### *Hines vs. Peyton Wood.*

**T**HIS was a special verdict which had been found about five years ago, and had been twice argued; and now it was moved, upon affidavits, that the court would grant a rule to shew cause why it should not be set aside. This was strenuously opposed, on the ground, that motions for new trials should be made within the term when the verdicts were given.

*Hall, Judge.* Let the motion be granted, and a rule made, returnable to next term.

### *Doe on the demise of Pilkington and Brown*

vs.

*Lutterloh.*

**H**ALL, Judge. If the ouster be laid before the demise, the jury on the trial shall take notice thereof, and give their verdict accordingly. If there be no ouster, there can be no damages for it; consequently, they must be satisfied that it was committed.



*The administrators of Hanks*

vs.

*the executors of Hanks.*

SET off pleaded.—And now on trial, the defendant produced an account, and a witness, who swore the account had been shewn to the plaintiff, who said, if the witness and defendant will prove it, I will allow it. And further, the witness said that they afterwards swore to it before a justice of the peace.

*Hall*, Judge. This evidence is sufficient to establish the set off.

And there was a verdict for the defendants.

*Vide* 1 C. D. Action, B. 4. 3 Lev. 241. 1 Leon. 94.

*Wilcox's executors vs. Wilkerson's executors.*

THERE had been a decree to account, and a petition filed by the defendant to set it aside; and Mr. *Williams* moved that the petitioners be required to give security for costs.

*Hall*, Judge. The petitioner must give security to the extent of the costs occasioned by the petition.

And he gave security accordingly.

*Wade vs. Edwards.*

THIS was an action of detinue for negroes, belonging to the estate of the father of the defendant. He left his widow executrix. He died in Virginia, leaving a will and his personal estate, part in Virginia and part in this state. The widow after qualifying and giving security, as required by the laws of Virginia, inter-married with Cheatham, who becoming insolvent, the estate of the testator was ordered into the hands of the sureties, pursuant to the laws of Virginia: and the plaintiff, one of them, having obtained a short possession of the negroes in question, who were in this state at the time of the death of the testator, sued the defendant, who afterwards got the possession.

It was argued for the defendant, first—That the probate in Virginia, enabled the executor to intermeddle only with the property there, and the sureties were only bound for the property which the probate enabled him to receive into his possession, which was only the property in Virginia: Consequently, the sureties had no right to interfere with the property in this state. For this were cited 1 Vern. 397. 11 Vin. 58. 1 H. Bl. Re. 153, 154, Toller, 47. Secondly—If he had no authority here, then the possession he took was a tortious one, and could not make a special property in him. 7 Term, 397, 398.

*Hall*, Judge, decided against the plaintiff principally on the last ground ; thinking that such possession constituted a special property sufficient for a recovery in detinue.

Verdict accordingly.

*Quere de hoc.*

Halifax, October Term, 1802.

*Vick vs. Whitfield.*

**T**HIS was an action for words ; and the defendant pleaded the general issue and justification.

*Johnston*, Judge.—The defendant may give in evidence, that the plaintiff's character is a bad one, in mitigation of damages ; but he shall not be allowed to prove any particular act.

Evidence of refutation was given accordingly, and the jury found for the plaintiff, but gave only six pence damages, owing as I suppose, to the evidence aforesaid.

*Den on the demise of Bowden and wife vs. Evans.*

**T**HE plaintiff claimed one undivided ninth part of the tract of land in question, and proved title to one eighteenth part only.

*Baker*, for the defendant, objected that he cannot recover a part only of that which he has claimed in his declaration ; and relied upon the case of *Young and Drew*, decided in this court by Judge Moore.

*Johnston*, Judge. If he is entitled to any part, he shall recover it ; and the defendant must be found not guilty for the residue which he claims and has no title to.

And in this case, Judge *Johnston* also decided, that it is sufficient evidence of the death of the ancestor of the lessor of the plaintiff, that he has been absent seven or eight years, and had not been heard of in that time.

Verdict and judgment accordingly.

*Alston, Young & Co. vs. Richard Ward's executors.*

**T**HE defendant pleaded the act of 1715 ; to which the plaintiff replied. And there was a verdict, subject to the opinion of the court, whether, as part of the seven years were in the time of the war, that time should be disregarded. Secondly ; whether the executor, having not paid over the assets, is not yet liable by virtue of the act of 1784, ch. 23, which directs " That as soon as an administrator shall have finished his administration on such estates, and no creditor shall make any further demand,

“the residue of such estate shall be deposited in the treasury, there to remain without interest, subject to the claim of creditors and to the lawful representatives of the decedent, without being subject to limitation of time.” The executor is not within the latter part of the act of 1715, ch. 48, sec. 9; for the law gave to the executor, all that was not disposed of: whereas, that part of the ninth section we are speaking of, directs “That if it shall happen that any sum or sums of money shall hereafter remain in the hands of the administrator after the term of seven years, shall be expired, and not recovered by any of the kin to the deceased, or by any creditor in that time: the same shall be paid to the church wardens and vestry, to and for the use of the parish where the said money shall remain.” As to the administrator, the law made no disposition of the surplus to him; and therefore it was necessary to say by this clause what should be done in such a case. The case of the administrator only is regulated by the act of 1784, ch. 23.

*Bloss vs. ———*

**EJECTMENT.** *Johnston, Judge.*—Seven year’s possession without a colour of title, will bar the plaintiff’s right to an ejectment; but if the wife be entitled, and the husband sell in fee, the purchaser is in under the wife’s title, and has not a possession adverse to her’s, till the death of her husband; then it is adverse. But seven years have not elapsed in the present case, since the death of the husband; therefore the plaintiff may recover.

Verdict and judgment accordingly.

*Quere*, as to the seven year’s naked possession being a bar to the plaintiff; for it is not law, as the Court of Conference has since decided.

*Young, Miller & Co. vs. Person’s administrators.*

**JOHNSTON, Judge.** The assignee of a bond not negotiable, may sue in a court of Equity if he pleases; and is not obliged to sue at law: but he must alledge that the assignment was for value.

*Hunter, assignec, &c. vs. Hill.*

**THIS** was an action of debt against Hill, as bail of Ashe. Plea in abatement, that he should have been prosecuted by *sci. fa.* and not by an action of debt. Demurrer and joinder. And after argument,

*Johnston, Judge*, said the act directs a *sci. fa.* and it must be followed—meaning the act of 1777, ch. 2, sec. 18.

Judgment for the defendant.

*Falkner vs. Perkins.*

JOHNSTON, Judge. The not taking possession immediately of goods conveyed by a bill of sale, is not of itself a fraud, but evidence only of fraud, and may be accounted for by evidence; and if satisfactorily accounted for, the vendee shall recover.

*Hamilton vs. Bullock.*

JOHNSTON, Judge.—The plaintiff moves for a new trial, and it is objected to him, that a new trial has been before granted; and that there cannot be a new trial after a new trial. I am of opinion there may be, and the court ought to grant a new trial, where it is evident the second verdict is against law.

So a new trial was granted the second time. 4 Burrow, 2108, was the case cited in confirmation of the judge's opinion.

*Davis vs. Duke.*

THIS was a petition for a part of the distributive share of Mary Duke, widow of the deceased: she having conveyed one half to the plaintiff. The defendant was the administrator of the deceased husband. A reference had been made to several persons, to state the amount of the estate, and the credits to which the administrator was entitled, so as to ascertain the share of each distributee. They had charged the administrator, who was the only son of the deceased, who had died prior to the year 1795, but after 1784, with the value of a tract of land, purchased and paid for by the father, but conveyed by his direction, immediately from the seller to the defendant. They supposed this was an advancement for which he ought to account to the other distributees. The defendant's counsel excepted to this charge, because he being an heir at law, was, under the act of distributions not obliged to account for it.

Counsel for the plaintiff *e contra*. First, the heir spoken of in the act of distributions was an heir at the common law, 2 Eq. Cas. Ab. 448. And since the act of 1784, concerning descents of real estates, there was no heir at the common law in this state. The heir was favored in England, because it was agreeable to the spirit of its constitution, to keep estates undiminished and undivided in one hand. That policy is directly against the spirit of our constitution. The distinction made by the act of distributions, in favor of the heir, is not now to be encouraged. Secondly, if every person who is made an heir by 1784 is to be exempt from accounting for the value of the land he has received, the act 1784 makes more persons unaccountable than the act of distributions did: For now the second, third and other sons

are not accountable, who by the of distributions were so. It is more consonant with the act of 1784, to say this part of the act of distributions is repealed, than to say that every heir shall be exempted from bringing into hotch pot. It is more in unison with the spirit of our laws, to narrow, than to extend the operation of the act of distributions on this head. Great equality was the object of the act of 1784, but what is contended for makes greater inequality: For according to what is argued for the defendant, if now a man dies, leaving 3 sons and 3 daughters, and has given to each of his sons lands worth an hundred pounds, and has left an estate of three hundred pounds; the second and third son shall take fifty pounds out of the three hundred, and each of the daughters fifty pounds: whereas before the act of 1784, the second and third sons must have thrown in their hundred pounds or have submitted to take nothing; in which case the share of each daughter would have been seventy-five pounds. If the act of distributions be repealed as to this part of it, then each son and daughter will have an hundred pounds. Some difficulty may indeed arise by such a construction, in the division amongst the heirs, of any lands which may be left undisposed of: For by the act of 1784, each heir is to account with the other heirs for the land he has received: And therefore, in the case stated, if one heir had received nothing, the first son for instance, he would receive out of the personal estate seventy-five pounds, and the second and third sons nothing, because of the land; and if the land was of the value of an hundred pounds, he would take the whole, and they nothing, because of the land. The answer is, if they account for it in the personal estate, then only the surplus should be accounted for amongst the heirs; in which case the lands of the value of an hundred pounds would be divided by taking so much for each from the hundred, and adding to the surplus of each what would make him equal: here again would be complete equality. The act of 1784 saying one heir shall account to another, if it mean for so much, as he is not obliged to account for under the act of distributions, will be productive of that equality which all our laws aim at; it is better to keep the second and third son accountable as before, and to say that the act of distributions is repealed as to the first son, than that it is extended to the others. The act of 1784 says nothing expressly upon the subject: But as its meaning must be found out, and was either to repeal the act of distributions on this point, or to extend it, I think it more agreeable to the spirit of that act, to repeal than to extend the act of distributions. Then it will follow, that when the act of 1784 directs the heirs to account amongst themselves, it must mean, subject to the act of distributions. They must either account, subject to the act of distributions, or not bring into hotch pot at all. And it is better to account that way, than, by not accounting, to make a greater inequality.

lity than before. The heirs have advantages enough without the construction contended for. They take the lands left by the deceased exclusively, and a share of the personal estate also : The lands are not liable for debts in the present instance, but the personal estate. After all this, is it necessary to say, that as to the small pittance of the personal estate still left, they shall share it with the daughters and not account for the land they have received from the father in his life time.

*Johnston*, Judge. What is meant by heir at the common law, in the case cited, is heir by the general law of the country, and not by the special laws of a particular place. The act of distributions is not repealed, and every person who is heir, is entitled to the benefit of it ; and is not obliged to account for the lands settled on him by his parents : Therefore allow the exception. As to the exception which states that the defendant purchased for the widow effects at the sale of the deceased, she is a debtor to him for the amount, and he has a right to deduct that amount from her share, altho' the conveyance to the plaintiff of half her share preceded the purchase.

### *The executors of Ward vs. Ward.*

**B**ILL to compel the defendant to deliver up a paper, purporting to be a deed given by their testator the father of the defendant to him for lands, directed by his will to be sold by his executors : For that the said paper was not the deed of the father. The testimony rendered it very probable that the father had signed the deed, but the proof of delivery which was offered, was, that after signing it he left it on the table, where it remained all night, and in the morning was taken up and put away by the father.

*Johnston*, Judge. The cases cited to prove this a delivery do not come up to what is wished. This is not a delivery in law, and I believe, from the circumstances, was not so intended by the father. He knew a deed without delivery was not effectual, but his children who were dissatisfied at the prospect of his marrying again, did not know it, and the old man adopted this mode of procuring his peace.

Decree according to the prayer of the bill.

## CIRCUIT COURT, December, 1802.

### *Sanders vs. Hamilton.*

**M**ARSHALL, Chief Justice. It is said Hamilton warranted the wench from whom descended the slaves afterwards recovered by Streater from Sanders. The record of that recovery is now offered, to be read to prove Streater's title. I am of opinion, that as Hamilton was no party to that suit, nor privy, it

cannot be read to prove Streater's title : it may, however, to shew that Sanders was evicted.

And it was accordingly read for that purpose only.

*Ogden, administrator of Cornell,*

vs.

*Witherspoon, administrator of Nash.*

THE defendant pleaded the act of 1715, ch. 48, sec. 9 ; "Creditors of any person deceased, shall make their claim within seven years after the death of such debtor, otherwise such creditor shall be forever barred." Divers other actions were in court pending upon the same pleadings ; and the court appointed a day for the argument respecting the validity and effect of the plea. On the day appointed, an argument was had, and the court took time to advise ; and some days afterwards, delivered their opinions in substance as follows :

*Potter, Judge.*—The act of 1789 is inconsistent with that of 1715, for it establishes a shorter limitation than the act of 1715, and upon different terms. The act of 1789, ch. 23, sec. 4, enacts, "That the creditors of any person or persons deceased, if he or they reside within this state, shall within two years ; and if they reside without the limits of this state, shall within three years from the qualification of the executors or administrators, exhibit and make demand of their respective accounts, debts and claims, of every kind whatever, to such executors or administrators ; and if any creditor or creditors shall hereafter fail to demand and bring suit for the recovery of his, her or their debt as above specified, within the aforesaid time limited, he, she or they shall forever be barred from the recovery of his, her or their debt, in any court of law or equity, or before any justice of the peace within this state." Section 5 directs "advertisements within two months after qualification," &c. The act of 1715, however, was in force till the act of 1789 ; but clearly its operation was suspended by the 101st sec. of the act of 1777, ch. 2, commonly called the court law, and by other acts passed after the beginning of the war, disabling British subjects to sue in our courts. These disabilities continued till the treaty of peace was enforced in this state by the act of 1787, which declares it to be a part of the law of the land. The act of 1799, declaring the act of 1715 not to have been repealed, and to have continued in force, has not the effect of making that act to have been in force after it was repealed, till re-enacted.

*Marshall, Chief Justice.* In the act of 1789, there is this clause : "That all laws and parts of laws, that come within the meaning and purview of this act, are hereby declared void, and of no effect." There are two rules for determining what act

shall be deemed to be repealed by a latter one. *If the latter be inconsistent with the former, it repeals the former. If it be reconcilable with the former, but legislate upon the same subjects as the former does, and repeals all other laws within its purview, the former is repealed.* Then what is the subject of the ninth section of the act of 1715? The estates of all dead men, and all creditors upon them, and a limitation of the time for the exhibition of such claims. What is the subject of the latter act? Precisely the same estates and persons, and a limitation of the time for bringing forward their claims. There is a legislation in both acts upon the same cases. The repealing clause then extends to the section in question. The act of 1715 prescribes a limitation, without an exception of persons; the act of 1789 excepts persons under disabilities, such as *femes covert* and the like. If the act of 1715 be in force, persons under disabilities will be excepted until the expiration of seven years, and not afterwards; for at that period all persons will be barred by the act of 1715, if it stand with the act of 1789. But why should the legislature design a permission for persons under disabilities to sue after the time prescribed in the act of 1789 for other persons, and until the completion of the seven years fixed by the act of 1715, and not afterwards? The same reason which continued the exception till the expiration of seven years, will still operate to continue it longer. If the exceptions are to last as mentioned by the act of 1789, until the disabilities be removed, then the act of 1715 must be repealed. The act of 1799 declares that the act of 1715 hath continued, and shall continue to be in force. I will not say at this time that a retrospective law may not be made; but if its retrospective view be not clearly expressed, construction ought not to aid it: that however is not the objection to this act. The bill of rights of this state, which is declared to be a part of the constitution, says in the fourth section, "That the legislative, executive and supreme judicial powers of government, ought to be forever separate and distinct from each other. The separation of these powers has been deemed by the people of almost all the states, as essential to liberty. And the question here is, does it belong to the judiciary to decide upon laws when made, and the extent and operation of them; or to the legislature? If it belongs to the judiciary, then the matter decided by this act, namely, whether the act of 1789 be a repeal of the 9th section of 1715, is a judicial matter, and not a legislative one. The determination is made by a branch of government, not authorised by the constitution to make it; and is therefore in my judgment, void. It seems also to be void for another reason; the 10th section of the first article of the federal constitution, prohibits the states to pass any law impairing the obligation of contracts. Now will it not impair this obligation, if a contract, which, at the time of passing the act of 1789, might



be recovered on by the creditor, shall by the operation of the act of 1799, be entirely deprived of his remedy?

Upon the point of suspension of the act of 1715, prior to its repeal by the act of 1789, I am of opinion with my brother judge, and for the reasons by him given, that it was suspended and continued so till the act of 1787, declaring the treaty of 1783 to be a part of the law of the land; for it was not settled till the making of the federal constitution, that treaties should *ipso facto* become a part of the laws of every state, without any act of the state legislature to make them so. It has been argued, that by an act passed in 1791, all acts and parts of acts retained in the compilation of Mr. Iredell, and not by him declared to be repealed or obsolete, or not in force, shall be held to be in force; and that the 9th section of 1715, being retained therein, and having no such declaration attached to it, is therefore in force. The whole of 1789 is also retained, and the repealing clause, as well as the other parts of the act: and if the repealing clause be in force, as no doubt it is, it had the same effect in 1791 as in 1788 and 1789, and continued to keep the 9th section of the act of 1715 repealed, until the passing of the act of 1799.

This cause was removed to the Supreme court by writ of error, where it was also decided that the act of 1715 had been repealed by the act of 1789.

N. B. The reporter was of the same opinion in 1799, when he published the manuel, and placed the act of 1715, as taking effect in the year 1799; but Judge *Taylor*, and some of the other Judges of the court of Conference, were of a different opinion, and held the act of 1715 not to have been repealed by that of 1789.

Newbern, January Term, 1803.

*Smith vs. ———*

SMITH's father-in-law had given him the Negroes in question; and Smith being afterwards sued by two creditors, and apprehending that his debts would exhaust all his property, gave back the same Negroes to his father-in-law, who promised to re-convey to Smith when his embarrassments should be over. Smith reclaimed the Negroes by this bill.

*Hall, Judge.*—Though it be insisted that a conveyance for the purpose of defrauding creditors, and upon trust, that the property should be re-conveyed to the grantor, should not be asserted in equity, so as to be carried into effect as between the parties themselves, when one endeavors to deceive the other after the main purpose is accomplished; and that equity will not hear one of them complain, that the other having concurred in

defrauding creditors, now endeavors to defraud his co-agent, but will leave the parties in the situation where they have placed themselves, and by so acting, render it unsafe for a debtor fraudulently disposed to place such a degree of confidence in any one: yet I am of opinion, that if a debtor, with intent to defraud creditors, convey to a third person who promises to hold in trust for his benefit, the grantee should be compelled in equity, to perform the trust. This contract is only void as to creditors: it is binding to all purposes as between the parties themselves.

*Quere de hoc*—*Et vide* 1 Fonb. 128, 138. 2 Vern. 602, 71. 2 Vezey, 375. 1 P. W. 620. 8 T. 95.

### *Woolford vs. the administrators of Wright:*

HALL, Judge.—On the plea of *plene administravit*, the administrator need not produce the subscribing witness to a note or bond given to him by the intestate, but may prove it by other means.

### *Blount vs. the heirs of Shepard:*

HALL, Judge.—It is not of course after a cause is continued, to move to amend the pleadings: the court will require an affidavit or some evidence, to shew the necessity and propriety of the amendment.

### *Johnston and wife vs. Pasteur:*

THIS cause came on again, and the facts appeared to be these: The wife of Mr. Johnston, when sole and under age, gave the Negro in question to the defendant's brother, who dying, the defendant became entitled under him, and took possession and continued it long after the intermarriage, and for many years after her coming of age; that is to say, for fourteen or fifteen years.

The defendant's counsel insisted first, that such long acquiescence on the part of the husband, amounted to a relinquishment of his title; and they cited a case determined in this court in the time of Judge Moore. Two brothers were entitled to a slave, and one or both of them sold him to a man in Newbern, when both were infants; they acquiesced for seven or eight years after coming to age, and the court told the jury they might consider that acquiescence as a conformation of the former sale; and there was a verdict for the defendant. Secondly: He insisted that this being an action of detinue in the name of husband and wife, asserted the *property* to be either in the wife, or in the husband and wife; and of course, if the property

really was in the husband only, the defendant did not detain *their* property, or that of the wife, as they had declared; and there should be a verdict for the defendant. It is not to be disputed but that a *chase in action* does not belong to the husband; and it is equally true, that whatever is not a *chase en action*, does belong to him by the intermarriage. It becomes then important to know what a *chase in action* is; and the definition I would give of it is, a sum of money recoverable by action only for debt or damages: this definition excludes specific property, which may be taken wherever it is found, and the possession vested in the owner without the aid of an action. He then cited terms *de ley chase en action*, 2 Bl. Com. 397. 1 Lill. Ab. 264. 2 C. D. 84. Baron and feme E. 3. *Brook chase en action*, Cox Litt. 351. b. Hall, Judge, was of a contrary opinion; and under his direction the jury found for the plaintiffs.

And there was judgment for the plaintiffs.

### *Anonymous.*

**T**HIS was an action to recover back monies, notes and other articles of property paid and delivered to the defendant by the plaintiff, as being won of him by gaming at cards. The facts were proved, and

*Harris*, for the defendant, insisted, that money won, cannot be recovered by the winner, yet if the loser pay it he cannot recover it back; *sic potior est conditio possidentis*.

*Haywood*, for the plaintiff, admitted this to be the common law, but urged the act of 1783, ch. 3. which makes void, among other things "every transfer of slaves, or other personal estate to satisfy money won." Money, he said, was within the description of personal estate, and the payment of it within that of the transfer of personal estate; and such transfer or payment being void by the express words of the act, no property vested thereby in the defendant, the winner; and he was a holder of goods, notes and money, which belonged to the plaintiff. As to the articles of property and notes delivered to the defendant, they seem to be within the express words of the act, "or other transfer of slaves or other personal estate, to any person or for his use, to satisfy or secure money won," &c. Was here a transfer of personal estate? and was it to satisfy money won? If so the act declares it void. And for what purpose shall it be so, if not for the benefit of the plaintiff, and to enable him to re-vindicate? In cases depending on the English acts against gaming, the loser having paid cannot recover back, because those laws allow the loser to pay if he will; they only afford him a defence against the action of the winner, which he, the winner, may also renounce if he will, and which he does renounce by electing to pay the money. The payment is a valid one, because not prohibited nor made void. By

our law, the payment itself is void. The English cases, decided on the ground of no re-petition against a *valid payment*, cannot govern this case, which is of a re-petition against a *void payment or transfer*.

This case did not proceed to judgment, owing to the dispersion of the jury, by a cry of fire; but *Hull*, Judge, told the Reporter, he was clearly of opinion, the plaintiff could not recover. Which seemed strange. *Vide Ambler 269.*

### Edenton, April Term, 1803.

#### *Devises of Eelbeck vs. James Granberry & others.*

A PAPER, purporting to be the last will of Henry Eelbeck, deceased, was offered for probate, to the county court of Chowan, and opposed, and an issue made up under the direction of the court of *devisavit vel non*, pursuant to the act for that purpose. A verdict was found in the affirmative, and an appeal taken to this court, and now came on to be heard in this court.

The proof of the execution was by one witness, who said he saw it signed by the testator, and witnessed it in his presence; and that the other witness, the next day, came into the room, and the will being called for was produced and handed to the testator, and then carried to the second witness, who asked the testator if that was his act, for the purposes within mentioned, who answered, yes; whereupon he signed in the presence of the testator. The other witness, in his deposition, said, that he came into the room and witnessed the will, and asked the testator, if that was his act for the purposes within mentioned, who said, yes.

*Taylor*, Judge. The requisites to the right execution of a will, are, *that the testator must be sane*, and under no restraint or improper influence; that he must sign it; that it must be witnessed in his presence by two witnesses. There is a sound distinction between an honest and an unfair exertion of influence. Should a brother or sister, for instance, with whom the testator had been at variance, represent to him the facts which had led to it, in such a way as to convince him that his displeasure was groundless, and by these means he should alter his former purposes, and make a will in her favor, or in favor of her children, to the prejudice of legatees provided for by a former will, that would not be cause for invalidating the latter. The jury will judge whether any influence has been used on the occasion of making this will; whether it was by fair and reasonable means, or by unfair and fraudulent ones, and decide accordingly. As to the point of execution, the two witnesses must each depose to the *signing* as well as to every other material fact. But the *signing* may be

proved, from the witness having seen it *written* by the testator, or from having heard him *acknowledge* it. It is not necessary, if he acknowledge the signing, that the *name*, or *signature*, or *hand writing*, should be before him at the time; if the paper lie at a distance on the table, and he acknowledge the signing without seeing it, it is sufficient. It is admitted, and so the law is, that the attestation of the witnesses may be at different times, so it be in the presence of the testator.

Verdict for the will.

NOTE.—In the case of Ellis and Smith, 1 Vezey, jun. 11, decided in 1754, Parker, Chief Baron, Willes, Chief Justice, and Hardwick, Lord Chancellor, all agreed that if it were *res integra*, and a construction for the first time to be made, they should not be of opinion that the acknowledgment of the name and signature or hand writing was equivalent to signing; nor that an attestation of witnesses at different times was good. And indeed a will may be easily substituted, if it be sufficient for him to say, that paper lying on the table is my will; but this cannot happen if the will be signed by him in the presence of three, and they, *simul et simul*, attest it in his presence. Nor can the witnesses impose a new will upon him if they all subscribe in his presence, together, the paper he signs in their presence. Would it not be better, as we are now putting a construction upon the act of 1784, ch. 22, sec. 11, to avoid the evils which these Judges discover in the British decisions, and which themselves would not make were the interpretation of the act now left to them. I much doubt whether even the British decisions, saying an *acknowledgment* is equivalent to *signing* go so far as to hold an acknowledgment good, which refers only to the paper lying at a distance. I think they will be found to be admissions of the signature whilst the testator is looking upon it, else how easy is it to get his acknowledgment of a paper which he in fact never signed?

The cases upon this point are, 3 Lev. 1 Skinner 227. Com. 197. 2 P. W. 510. Carth. 35. 3 P. W. 254. 2 Vezey 454. 1 Eq. Ca. Ab. 403. Doug. 229. 1 Wils. 313.

### *Campbell's executors vs. Leach.*

LEACH had purchased lands of Campbell, and in part of the price, had given him a note on Ellison; with an endorsement, purporting that he, Leach, would be liable for the amount, in case Ellison should prove *insolvent*. Campbell sued him and had judgment, and issued a *ca. sa.* and he was committed to gaol, and gave security for the prison bounds and forfeited his bond.

*Taylor, Judge.* The endorsed bond was substituted for that portion of the original debt, the amount whereof it represents. Leach cannot be made liable, but upon the terms of the endorsement; that is to say, not unless it be established, that Ellison was insolvent. A loss of the debt for any other cause will not subject him.

### *Halsey's administrators vs. Buckley.*

**DETINUE** for Negroes. It appeared these Negroes had been given by will, to the widow of the testator for life; and after her death to the plaintiffs. She married, and her husband sold them to a person under whom the defendant claimed. And after her death, whilst in the possession of the defendant, or the vendee, these plaintiffs sold them. The purchaser sued and was nonsuited, because his action was improperly commenced.—Then the plaintiffs sued in the present action, but before its commencement the three years had elapsed, and the question now was, whether the verdict which had been given in the former action could now be given in evidence: And after much argument the court decided it could not; for that between the vendor and vendee of a chose in action, there is no privity which the law will recognize.

### *Pearse vs. Owens.*

**EJECTMENT.** In this cause the following points were ruled by

*Taylor, Judge.* First, a deed made since the statute of uses, is not to be construed by the same rules of interpretation as were applied to deeds before that statute. If a deed now gives an estate to a woman for her life or widowhood, she is not to take the estate which is most beneficial but to hold during her widowhood only; the nonsuit which is moved would therefore be improper; for the widow, though alive, has determined her estate and widowhood by marriage.

Secondly, incertainty in a deed will invalidate it; but it must be such an uncertainty as makes it impossible to tell what estate is granted, or who is first to take.

Thirdly, the assent of a grantee is to be pre-secured to a deed in his favor. Here J. Harrol made the deed under which the plaintiff claims an estate tail: there is no subscribing witness, but the grantor acknowledged it in court; and that is a proof of the assent of the grantee. Upon such acknowledgement it was recorded. The deed therefore is well enough notwithstanding the objection.

Fourthly, the estate is limited by this deed to *heirs of the body*, and though afterwards it gives power to the tenant in tail, to sell

to any of his brothers, it is not to be taken that this clause is to influence the former, but it must be rejected as repugnant.\*

Fifthly, this deed was executed in 1751; the deed to the grantor was in 1747; which, for want of the examination of the feme covert, who was the owner and proprietor, was not at first valid; and therefore it is urged, that he had not an estate out of which he could create an estate tail. It is in proof that he and his son made tenant in tail, continued in possession more than seven years; and that is sufficiently confirmatory of his estate, to make good the estate tail.

\* *Vide* Alston's executors *vs.* Jones. And why not continue it as you continue deeds to uses, or an estate for life or widowhood; that is to say, so as to effectuate the parties' meaning? If so, he certainly meant an estate which the party could sell; and why lean in favor of a perpetuity when the meaning will give a fee?

### *Sawyer vs. —*

**TAYLOR, Judge.**—If one patent laps over upon another, and the latter patentee is in the actual possession of the part covered by both for seven years, he will acquire the title; but if neither be in the actual possession, it will belong to the first patentee.

### *Symonds vs. True Blood.*

**THE** plaintiff's deed covered a piece of land including that in dispute; and of the whole of this piece, the defendant had been more than seven years in possession, and the plaintiff has had no possession of any part during that time: but the defendant entered into the common rule, not only for this piece, but for another piece adjoining, which had been in the possession of the plaintiff; so that taking the piece defended for altogether, plaintiff had possessed one part, and defendant all the rest. That part however, which the plaintiff had possessed, was no otherwise a part of the disputed lands, than as it was defended by defendant; for defendant's deed did not cover it, and he did not on the trial claim it.

**Taylor, Judge.**—The record only can shew us what land is in dispute, and that appears to be a tract composed of different parcels; part whereof the plaintiff has possessed, and part the defendant. Then the rule applies, that he who is in possession of part of the tract claimed by both, though the other is also in possession of part, shall be deemed the possession of the whole: consequently, the defendant has no legal possession of any part, and the plaintiff's title must prevail.

*Quere de hoc*, for possession of plaintiff extends as far as the bounds expressed in the deed under which he claims, and no farther; and if he has sold part out of the deed, as far as the boundaries of the remaining part, and cannot be enlarged by the circumstance of defending for more than he has possessed, had the defendant entered into the common rule for more than he had really possessed, he had a good title thereto: and what law says he shall forfeit *that* if he claims more? This decision, however, has certainly imposed that forfeiture on him.

Halifax, April Term, 1803.

*James Barnes vs. Hill's executors.*

SET for hearing—and now moved by Mr. Brown, for the plaintiff, to amend, pointing out the particulars of the amendment to be made.

*E contra*, it was argued by Baker, that he ought to have amended before: it is now too late.

Hall, Judge—We will hear the cause now, and if the necessity of an amendment shall appear, we will consider what is to be done.

*Hamilton vs. Person's administrator.*

THE bond was dated in 1777, when money was depreciated two and a quarter for one, payable in 1778, when money was depreciated four and a half. The jury found the value according to the latter period. In consequence whereof, they found for the defendant, his payments being larger than that value. A new trial was moved for, and the ground of the motion was, that the jury should have sealed at the former period.

*Counsel for the defendant.*—All that we are bound to do by the treaty is, to give the value of the debt to the British creditor: and if we estimate the value by the same measure as to our citizens, there cannot be any cause for complaint. The act of 1783 has declared that all matters, circumstances and things, shall be given in evidence to the jury, and that they shall make up their verdict according to equity and good conscience. They have not directed the time of the contract, nor of the payment to be taken as the proper period. The jury are the only proper judges—and here they have valued their debt: and what is there to enable us to say they have done wrong? No evidence at all was given of the consideration of the bond. Perhaps it may have been a speculating contract, made with a view to the value at the time of payment. The jury ought so to consider every contract made in times of depreciation, unless circum-



stances are presented to them on the part of the plaintiff, to shew the justice of the other period.

*Hall, Judge*—Let a new trial be granted.

### *Thompson vs. Allen and others.*

**I**NJUNCTION bill. Mr. *Harris* moved to continue the injunction. The counsel on the other side suggested the death of Allen, on the record.

*Hall, Judge.* The point of his death shall be tried *instantly*, unless the court can be satisfied that there is a strong probability of his death.

Whereupon, evidence was given that his friends have received letters stating his death; and then the cause was continued till next term.

The defendant's counsel took out a *sci. fa.* on the law side of the court, calling upon Thompson, who was defendant at law, to shew cause why the administrator of Allen should not have execution upon the judgment at law, which Allen had in his lifetime obtained against Thompson. And thereupon Thompson took out a *sci. fa.* in equity, to make the administrator a party to his bill in equity, so as to keep up the injunction against the administrator. Then the administrator answered and dissolved the injunction.

### *Jones vs. Drake.*

**T**HE defendant was an infant, and was served with the bill in equity before the last term; and at the last term, Davis was appointed his guardian to answer and defend the suit for him.

And now Mr. *Plummer* moved that he was not bound to answer at this term, because he had not been served with a copy of the bill.

*E contra*—The practice is to serve the bill on the defendant, and then appoint him a guardian to answer *that* bill. There is no necessity to serve the guardian with a new bill. And the counsel cited 1 Harrison, 474, and Kay vs. Black's heirs, in this court.

*Hall, Judge*, doubted; but applying to Baker to know how the practice was, and he saying it was to serve the bill on the infant only; his honor then held the guardian bound to answer, without being served with the bill, but gave time to answer.

### *Carter and wife vs. Alston.*

**B**ILL and answer. The object of the bill was for an account of the personal estate of Jesse Atherton, deceased; Alston being the administrator. It stated that the defendant pretended

a release, and the plaintiff admitted that he signed the same, but says he was ignorant of his right, and also under age.

The defendant answered he had received property, part of the said estate, and disposed of part thereof after being of age. And the question now is, whether an account shall be decreed.

*Hall, Judge.* If the account should not now be ordered to be taken, and at the next term a verdict should be against the defendant, we shall not be ready to pass a final decree, for want of the account. It should therefore be taken as one of the materials for making up a decree, in case it should turn out that he is liable to account.

### *State vs. Carstaphen.*

**I**NDICTMENT for perjury. On the trial, after part of the evidence delivered, the Judge retired for a few minutes.—Two of the jurors also retired, without leave and without an officer, and returned again.—The jury found him guilty. And it was now moved that the verdict should be set aside: and the defendant's counsel cited Jacob L. D. *verbo* jury, who cites it from Lilley; and also 2 H. H. P. C. 295.

*Hall, Judge.*—If it shall appear upon the affidavits of the jurors, that they did not speak with any person in their absence, the verdict ought not to be set aside.

And this afterwards appearing, the defendant's counsel did not further press his motion.

### *Sheppard's executors vs. Cook's executors.*

**T**HERE were two actions of debt depending upon two bonds, written upon the same piece of paper, and taken at the same time. The jury tried one, and found for the defendant. The plaintiff's counsel then moved that the other cause might be submitted to the other jury attending the court.

*Hall, Judge,* refused this, saying it would impute to this jury improper conduct.

Whereupon the plaintiff suffered a nonsuit, and moved afterwards it should be set aside; and cited Co. Litt. 157, to shew, that a juror who had once tried the cause or matter in dispute between the same parties or others, could not try it again: here the parties were the same, and the point the same as in the other cause; namely, whether 15 or 16 years acquiescence after the last acknowledgement of a debt due upon bond, is sufficient to raise the presumption of payment. Your honor left it to the other jury to declare in the affirmative, and they did so. The plaintiff's counsel conceives it to be a rule, that if the plaintiff suffer a nonsuit out of a deference to the court's opinion, and that is wrong, that the court is bound to grant a new trial: 1 Bl. Re.

670. 2 Bl. Re. 698. 2 Bl. Re. 1228. And what prospect could the plaintiff have in submitting his cause to a jury who had just determined against him the very point they had already passed upon in the other? A point which it is conceived they determined improperly, because of a wrong direction given by the court. It could not be known by the plaintiff's counsel, that he could obtain a new trial. It would have been madness to have risked a new trial; the jury and court being both against his client; when the counsel was satisfied that at another time when the law could be properly understood, his client would recover. It is not the rule that 15 or 16 years is sufficient to raise the presumption of payment. It is that which Judge Johnston laid down some time ago at Wilmington, in the case of the administrators of Quince *vs.* the administrators of Ann Ross. Whereas the court here took up the idea broached by Mr. Brown, that the rule of presuming payment after 20 years, was when interest was at five per cent.; so that the presumption arose as soon as the interest equalled the amount of the principal; and that was done in this country at the end of 16 years and a few months. Presuming payment from time, was begun in the term of lord Hale, when interest was at eight per cent. The case in 6 Mo. 221 in the second year of queen Ann, is prior to the reduction of interest to five per cent.

Hall, Judge, The objection is not a good one, and I cannot set aside the nonsuit. It is not a sufficient ground for setting it aside, that a new trial is granted in the other suit.

In consequence of which, and of the opinion of the court, the nonsuit was suffered: so plaintiff had to pay all the costs of this suit. Then he commenced a new action; but in the mean time having recovered on the other bond, the defendants agreed to pay the money mentioned in this.

I must say *quere de hoc*, for I believe on the point of presuming payment, the right time is 20 years: 6 Mo. 22. 3 P. W. 395. 2 Atk. 144. 1 Ch. Rep. 42. 1 Term, 270. And I also believe that the nonsuit having been forced upon the plaintiff, from an apprehension that the same jury would decide the same point as they had just done before; that such nonsuit ought to have been set aside, having resulted from the wrong opinion of the court.

### *Devany and Bobbit vs. —*

THE now plaintiffs were surties on an appeal bond, drawn differently from what is prescribed by the act of Assembly. The Court of Conference had condemned such bonds in other cases, and discharged the defendants. Upon this bond, however, being with condition "to pay all costs and charges in case the appellants should be cast," this court had entered up judgment

against them *instantly* on motion, for the principal and costs. The plaintiffs obtained a *supersedeas*—and new moved to have the said judgment set aside; and they urged by their counsel, that at this day the court would give the same relief on motion, as they would give on an *audela querela*: and he cited Bosanquet, 428. French law, 488. 3 Bl. Com. 406. 4 Mo. 314. And he said this was a case which the court would give relief in, upon an *audela querela*; because judgment being entered *instantly*, the party had no opportunity to shew to the court the insufficiency of the bond.

Hall, Judge, took time to consider, and discharged the *supersedeas*—saying, that though the judgment was erroneous, he had no power to alter it.

*Vide* Andrews 20, where, in an action of account, the defendant pleaded that he had fully accounted; the jury found he had not, and assessed damages: The plaintiff entered final judgment and issued execution, and the whole court decided that the judgment was wrong; and that being irregular, it may be set aside on motion.

### *Hamilton vs. Bullock.*

THE plaintiff had sued by bill in equity, upon some equitable circumstance, to give jurisdiction for a sum of money due by bond, dated in times of depreciation; and the question arose, who should value the money by applying the scale, the court or the jury?

Hall, Judge, after hearing an argument, and taking time to advise, said he would carry this question to the Court of Conference, though his opinion was, it belonged to the jury to decide.

### *Whitehead vs. Bellamy.*

THIS was a bill in equity for mesne profits of dower lands, of which the plaintiff had been deprived many years, to have an account thereof, and to be paid what was due. The case was this:—Her husband did not die seized of these lands; they were sold by *fi. fa.* before his death, under the royal government. Clinch, the purchaser under the *sci. fa.* was sued by her for her dower, and then he died, leaving the land to Bellamy. To this bill the defendant demurred.

Harris now argued, first, that it is settled law ever since the statute of Merton 9, H. 3, or 20 H. 3, that a widow is not entitled to damages for dower lands detained from her, unless her husband die seized: Here he did not die seized.

*E contra*, it was argued that equity will entertain a bill for the recovery of mesne profits in dower lands, in cases where the law

will not, and will give further relief than the law will; and that it is a principle of equity, that where justice requires a thing to be performed, which the law does not enforce, equity will give relief: 1 Fonb. 20. This principle is enough for our purpose; for here the estate of Mr. Clinch has been benefitted by receiving the profits of the dower lands—and the plaintiff has lost them when she ought to have received them. If the law does not entitle her because the husband did not die seized, I ask where is the difference in point of substantial justice between the case of his dying seized or not? If a stranger keeps her out of possession, he ought to reimburse her as well as an heir.

The objection, that the executor ought not to pay, is valid at law, but it will not avail here. 2 Brown, Ch. Rep. 620, establishes this position. It proves likewise all the other points we wish. It proves that a court of Equity will *universally* give an account of mesne profits where justice requires it. If Equity will give relief against executors, when at law they are not liable, because it is just to do so; why shall it not relieve the widow for mesne profits, although the husband did not die seized? The principle which gives the one will give the other.

Hall, Judge, took time to consider, and declared the inclination of his opinion to be against the complainant; but said he would consider the case, and if he had doubts, would carry it to the court of Conference.

### *Sheppard's executors vs. Cook's executors.*

THIS is the action spoken of before in the other case of the same name. It was an action of debt on a bond, dated in 1773, payable in 1774. Within 15 or 16 years, the plaintiff and the defendant had been at variance, and agreed to be reconciled, and the plaintiff invited him to his house. Cook said within the same time, that the bond was given for the lands he had in his possession, but that the obligee had not made him a title, and he would not pay.

Hall, Judge, directed the jury, that from the 10th of March, 1773, to June, 1784, was not to be regarded in the computation of time—and that payment might be presumed in 15 or 16 years, with small circumstances to aid it.

They found for the defendant; and the plaintiff's counsel moved for a new trial: and after argument, and time taken to consider,

Hall said, it is proper that the time for raising a presumption of payment against a bond, should be fixed and understood in the same way by all the courts. Some other judges have considered that 20 years was the time: here there is neither 20, or even 18 years; so that the presumption has not attached, if

that opinion be correct. Also, payment pleaded, means payment at the day ; and if so, the evidence proved an admission of the debt long since, and of course its existence since the time to which this plea refers. There must be a new trial.

*Haywood* endeavored to continue the other case for want of a material witness ; but *Hall* said he would not receive any affidavit but the plaintiff himself ; and said to *Haywood*, "you know that it is a rule you yourself have urged." I do not know whether he referred to *Wheaton and Cross*, Wilmington, May term, 1801.

### *Newsome vs. Person's administrators:*

THE plaintiff charged for services performed in the year 1792, and from thence till the death of the intestate, in 1800. The statute of limitations was pleaded. He gave credit for a plantation within three years ; and defendant's counsel examined as to the value of this plantation, endeavoring to bring out that it was of more value than credited at.

*Hall*, Judge. For all items above three years, the act of limitation bars the plaintiff, unless the defendant has made some promise to pay within the three years. Keeping an account against the plaintiff, and charging him with items within three years, admits a current account, and amounts to a promise to pay the balance ; and so takes it out of the act. The defendant in the present instance has produced no such account, but he has claimed a credit arising within three years ; and that is equivalent if the jury chuse to consider it so, to keeping an account against the plaintiff ; and then the act will not bar any part of the plaintiff's account.

Verdict accordingly.

### Wilmington, May Term, 1803.

#### *Rutledge vs. Read.*

TAYLOR, Judge.—The deposition offered in evidence, was taken not at the precise day mentioned in the notice, but on the next day upon an adjournment ; and it is objected that a deposition cannot be taken at an adjourned day, for then the commissioners by adjourning for weeks or months, might compel the party noticed, to remain on expences, or abandon his cross examination ; and it is urged, that if the commissioner may adjourn once, he may oftener—and so adjourn whenever the party noticed should appear to join in the examination. The cases stated would not be allowed of. Here however, the adjourn-

ment is to the next day ; no time intervening ; and that cannot produce the mischiefs apprehended.

The deposition was read, and it proved a note dated at Charleston, and the endorsement thereof to the plaintiff.

The counsel for the defendant, objected that there are but two ways of declaring on this note in the name of the assignee. The one stating it to be a South-Carolina note ; and that by the laws of South-Carolina, it was negotiable by assignment, and that it was assigned; the other not mentioning that it was a note drawn in South-Carolina. In the latter case it would be assignable by the laws of North-Carolina, and should upon the production appear to be a note not drawn out of this state. Here the note proved, was drawn in South-Carolina, and so appears to be on the face of it. It should not be given in evidence, because variant from the declaration.—If declared on as a note drawn in South-Carolina, then the allegation, that it is assignable by the law of South-Carolina, is a material one, and should be proved. Here it is not proved, and the plaintiff therefore should not be permitted to recover.

After this objection, the plaintiff gave evidence of a promise to pay to Rutledge, the assignee, the amount of the principal debt.

*Taylor, Judge.*—I am at present of opinion, that the objections are good ; and that a note drawn in South-Carolina, cannot be considered here as endorsable, unless it be proved to be the law of South-Carolina, that such notes are assignable. I know privately, that by the laws of South-Carolina, such notes are assignable ; but I cannot say judicially that they are so, unless they were proved. It cannot be proved by parol, because the laws themselves are better evidence, and may be had. As to the express promise that renders the defendant liable to the extent of the principal sum, I am willing however, that a new trial should be moved for, or the case removed, in order to have further consideration of this point.

Verdict for the principal sum on the express promise, or a new trial was moved for and granted upon the ground of surprise.

### *The assignees of Barclay vs. Carson.*

**TAYLOR, Judge.**—This being an action against a debtor of the bankrupt, producing the commission and assignment, is a proof of the trading, bankruptcy, the time thereof, and appointing the plaintiff's assignees. Were this a debt due from Gibbs and Barclay, I am of opinion, that as the assignees of Barclay had sued, and no plea in abatement put in, that they may recover a moiety. I am of opinion also, that a creditor of Gibbs and Barclay, may be a witness to prove the debt due to

Barclay, if it be proved that the separate estate of Barclay will not suffice to pay his separate creditors : for, as the creditor upon the joint fund must first apply to the joint fund, and the separate creditors to the separate fund, if this latter be exhausted by the separate creditors, a creditor in the joint fund can have no interest in placing the demand in question in the separate fund ; and in so doing, he diminishes the joint fund out of which his dividend is to come. I am of opinion also, that Gibbs, the other partner and bankrupt, may be admitted as a witness to prove the debt due to Barclay, for that tends to diminish the fund out of which his allowance is to come.

A demand against the bankrupt, which the defendant has acquired since the bankruptcy, cannot by the express words of the act, be set off against the assignees. Of this nature is a debt paid by the defendant since the bankruptcy, as a surety before ; so also is a debt arisen by delivery of goods to the bankrupt by the defendant since the act of bankruptcy committed.

*Mulford vs. ———*

**TAYLOR, Judge.** If this were what it is represented to be by the defendant's counsel ; a contract made between the plaintiff and the defendant, to vest the property in the defendant for the purpose of defeating creditors, and then to be for the use of the plaintiff ; I should not hesitate to say with him, that this court would not enforce the return of the property. But this is not that case. He permitted the defendant to purchase the slave in question, and to pay for him at a low price, with a promise on the part of the defendant to return him whenever the plaintiff could reimburse him. He has tendered the money, and my opinion is, he should have back his negro.

Decreed accordingly.

*Anonymous.*

**TAYLOR, Judge.** The deposition offered in evidence, does not specify the place where taken, and for that reason it cannot be read ; but I do not see why the party who wishes to use it, may not be permitted to prove that it was taken at the place mentioned in the notice. And clearly the commissioner may now amend the caption by inserting the place.

He was present and did so, and the deposition was read.

*Brice vs. Mallett.*

**TAYLOR, Judge.** The defendant has pleaded another bill pending in another court for the same cause ; and this is denied by the replication. The proper way now to be pursued,



is to refer it to the master, to inform the court whether the plea be true or not.

### *Dennis vs. Farr.*

**EJECTMENT.** The plaintiff proved title to the whole tract to have been in Wilson and wife, from whom he purchased; but as to part, the defendant had been in possession, and was so at the time of the plaintiff's conveyance to him. He claimed to certain lines which he supposed included part of the land the plaintiff claimed. These lines, however, it was proved on this trial, really included other lands out of the plaintiff's bounds; and then he was in possession, claiming to certain bounds.

The counsel for the plaintiff cited the case of Symonds and True Blood, and urged that here the defendant had defended for the whole—when, as to part defended for, there had been possession in the plaintiff; and if in such case the plaintiff was in possession of all as regarded the act of limitations, he was also in possession as to the objection of selling a right of entry.

Judge Taylor doubted much if there was not a difference between the cases, and directed a verdict for the plaintiff: but as to the field occupied by the defendant at the time of the conveyance to the plaintiff, he reserved the same for further consideration.

### *Reardon vs. Guy.*

**REARDON** had entered and paid for a tract of vacant land, and his grant was suspended by Guy. This suspension was tried in the county court of Duplin, and a *certiorari* was obtained by Reardon.

And now *Jocelyn* objected, that the act of Assembly had denied an appeal; and this court cannot issue a *certiorari*, for that is to exercise appellate jurisdiction as substantially as if it had come up by appeal.

Taylor, Judge. The jurisdiction of this court cannot be taken away but by express negative words; where an appeal is not allowed by law, a *certiorari* is the proper remedy: for suppose injustice done in the proceedings either by the court or jury, must the party have no relief against it because he is not allowed an appeal? No, surely. He shall then have such remedy as suits his case; and a *certiorari* has been used as the proper one for many years back. This *certiorari* was obtained on an affidavit, stating the grounds of requiring a new trial. That is not contradicted by any cross affidavit, and is to be taken as true: Therefore let a new trial be granted.

## COURT OF CONFERENCE,

June Term, 1803.

*Den, on the demise of Swann, vs Mercer.*

**T**HIS cause now came on to be argued before this court; and was argued by *Haywood*, for the defendant, and by *Brown*, for the plaintiff.

*Haywood*, for the defendant.—Were it not for the clauses in 1784, ch. 22, sec. 7, and ch. 10, sec. 3, the mother could have no pretensions. Before this period she could in no event inherit. Let it be inquired then, how the estate would have descended, had those clauses been omitted, and we shall find the estate would have gone to the father's sister of the half blood on the mother's side. Let it next be inquired in what cases those clauses admit of the succession of the mother, and it will be found that the case before the court, is not one of those described in the act; and consequently that the claim of the mother cannot hinder the succession of the father's half sister.

In order to discover how the land would have gone, had the clauses referred to been omitted, let it be asked how the lands would have gone had John Swann died without a child? Secondly; how they would have gone, had his son died, not leaving a mother? For if in both these instances they would have gone to the father's half sister, they will still go to her unless the said clauses warrant the claim of the mother. Thirdly: let it be asked, in what case can the mother succeed under those clauses? If it be found that the case before the court is not one of those described in the said clauses, then is the mother's claim at an end; and that of the father's sister of the half blood, is good.

First: how would the lands have gone, had John Swann died without a child? The act of 1784, ch. 22, sec. 3, answers—"If any person dying intestate, should at the time of his or her death be seized or possessed of, or have any right, title or interest in or to any estate or inheritance, in lands or other real estate in fee simple and without issue, such estate or inheritance shall descend to his or her brothers; and for want of brothers, to his or her sisters, as well *those of half blood as* those of whole blood, to be divided amongst them equally, share and share alike, as tenants in common, and not as joint tenants, &c. Provided, that when the estate shall have descended on the part of the father, and the issue to whom such inheritance shall have descended, shall die without issue, male or female, but having brothers or sisters of the paternal side of the half blood, and brothers or sisters of the maternal line

“ also of the half blood, such brothers and sisters respectively of  
 “ the maternal line, shall inherit in the same manner as brothers  
 “ or sisters of the whole blood, until such paternal line is ex-  
 “ hausted of the half blood ; and the same rule of descent and  
 “ inheritance shall prevail amongst the half blood of the mater-  
 “ nal line under similar circumstances, to the exclusion of the  
 “ paternal line.” In other words, John Swann’s brothers and  
 sisters of the father’s side of the whole and of the half blood,  
 shall succeed ; but if there be none such, then his brothers and  
 sisters of the half blood on the mother’s side : and who is that  
 in the case before us ? The person under whom the defendant  
 claims, his father’s sister of the half blood on the mother’s side.  
 Were it not then for the clauses above mentioned in favor of  
 the parent, the lands in question would belong to *this person*.

Secondly : to whom would they belong, had the son of John  
 died, not leaving a mother ? The act of 1784, ch. 22, sec. 4, an-  
 swers—“ The same rules of descent shall be observed when the  
 “ collaterals are further removed, than the children of brothers  
 “ and sisters.” What rules of descent ? Why, that the half  
 blood shall take equally with the whole blood, under the restric-  
 tions contained in the proviso to the third clause ; that is to say,  
 the father’s brothers and sisters on the father’s side, both of the  
 whole and half blood ; and for want of such, his father’s brothers  
 and sisters of the half blood on the mother’s side. In the pre-  
 sent case, who is that ? The person under whom the defendant  
 claims, the father’s sister of the half blood on the mother’s side.  
 The defendant then would have been entitled, had there been no  
 mother.

Thirdly : In what cases can the mother succeed to a son’s es-  
 tate under 1784, ch. 22, sec. 7, 1784, ch. 10, sec. 3 ? and is this  
 one of those cases ? This is a case where the lands descended  
 from the father to the son. The first case mentioned in these  
 clauses, where a parent shall succeed, is where “ the estate has  
 “ been *derived* in fee from such parent :” 1784, ch. 22, sec. 7.  
 The act necessarily means a derivation from a parent by some  
*conveyance* ; for it means a derivation by *descent* or *devise* from  
 a parent : then the parent must be dead before the death of the  
 child. This is not a case of lands *conveyed* to the child, but of  
 lands *descended* from the father ; therefore out of the clause in  
 question, and under the operation of the other parts of the act  
 before spoken of. The next case described, is where the child  
*actually purchased* : “ Then it shall be vested in the father if  
 “ living, but if dead, then in the mother for life ; and after the  
 “ death of the mother, then in the heirs of such intestate on the  
 “ part of the father ; and for want of heirs on the part of the fa-  
 “ ther, then in the heirs of such intestate on the part of the mo-  
 “ ther :” 1784, ch. 10, sec. 3. The present is not a case of lands  
*actually purchased* by the child, and is therefore out of those

clauses, and under the operation of the other parts of the act. The last case described in these clauses, is where the lands were *otherwise acquired*; then they are to go "first to the father, if living; then to the mother for life; then to the heirs on the part of the father; and for want of such, to the heirs on the part of the mother:" 1784, ch. 10, sec. 3. These words are put in contradistinction to the two former cases, and are intended to describe some case, other than a *derivation* by conveyance from a parent, and other than an *actual purchase* by the child. They do not mean acquisition by *descent* from one parent, so as to enable another parent to take: for these reasons: First—because the 7th clause contemplates a case where there is an equal chance for both parents to be alive to take: the lands are to go to the *father, if living*, and to his heirs; but if dead, to the *mother or her heirs*; as much as to say, if both be alive, the father shall take; if the father be dead, the mother shall take. The case meant then, is such an one as may occur, both parents being alive; and that is not the case of a descent from either parent. If the land descended from the father, he must be dead; if from the mother, and the father be dead, she must also. The act speaks of a case where, if the father be dead, she may be alive to take. It shall go to the father, but if he be dead, to the mother. They do not mean acquisition by descent from a parent, because by the clause of 1784, ch. 10, if the father be alive, he is to succeed, and his heirs forever; then if the estate descended to the child from the mother, and the child die, the father's family inherits; if it descended from the father, then after the death of the mother, it shall descend to the heirs of the father. This cannot be the meaning of the act; the words "*otherwise acquired*," are intended of some case not involving such unjust and unequal consequences. Such cases there are, and they shall by and by be mentioned. Again: they do not mean a descent from a parent, because by the third clause of 1784, ch. 10, if the father be dead, and the mother succeed and die, the estate shall go to the heirs on the part of the father; and for want of such, to the heirs on the part of the mother. If then they mean a *descent*, lands descended from the mother (the father being dead) will go to the heirs of the father. This cannot be; for it contradicts the spirit and letter of 1784, ch. 22, sec. 3 & 4; the rule of descent amongst collaterals further removed than the children of brothers and sisters, namely, amongst uncles and aunts, shall be the same as amongst brothers and sisters; that is to say, brothers and sisters or uncles and aunts on the mother's side, shall exclude those on the father's side, where the lands descended on the side of the mother. Yet if these words mean a descent, lands descending from the mother to the son, and he dying without children or brothers or sisters, will go, if the father be dead, to the heirs on the part of the father;

that is to say, to uncles and aunts on the father's side, in exclusion of the uncles and aunts on the mother's side. Therefore the construction contended for on the other side, is not only unjust and destructive of equality, but also repugnant to other clauses in the act of descents. Such a construction ought to be avoided, and some other adopted, which will neither operate unjustly nor unequally, nor be repugnant to the foregoing parts of the act. If such an one can be found out, then that which assigns to the words in question, a signification comprehending the case of an acquisition, by descent, from a parent, and consequently a meaning productive of injustice, inequality and repugnance, must be avoided. Again: they cannot mean an acquisition by descent, because 1784, ch. 10, sec. 3, contemplates such an acquisition as leaves it to accident, whether the father shall be living or dead at the time of the child's death; and such a case as by such accident of the father's death before the child's, may carry the estate to the mother; *whereby the descent may be altered by the accident of death, and the paternal line which is favored in all other instances, be deprived of the inheritance by such accident.* Also, the case here contemplated, is such an one, where, agreeably to the spirit of the act, the father's family ought to have the lands, in exclusion of the mother's family; at least preferably to the mother's family. Can this be meant of a descent? Is it not agreeable to the spirit of the act, that the mother's relations shall have the mother's estate, preferably to the fathers; and the father's relations his estate, preferably to the mother's relations? Or can it be said that these words mean a descent from the father, and not a descent from the mother?

The preamble to sec. 3, of 1784, chap. 10, converses about a case, where the mother is alive, and the father by accident dead, at the time of the child's death, which accident transfers the estate to the mother and her heirs under 1784, chap. 22, sec. 7. Now such an accident could not fall out *as an accident*, if the lands had already descended from the father to the son dying: it could not be an accident that he was dead at the son's death; it could not be an accident that carried the estate to the mother and her heirs; it must (if the words, *otherwise acquired*, mean such a case) go to the mother in spite of all accident. But if they mean lands *conveyed or devised or the like, from some person other than a parent*, then such accident may convey the estate to the mother and her heirs; for then it may or may not happen that the father is dead at the time of the child's death. Lands by descent from the father, if included in the words *otherwise acquired*, were not subject to alteration in the line of descent, by the accidental death of the father before that of the child, but inevitably went to the mother and her heirs; yet *otherwise acquired* did include a case, subjected to such accident and alterati-

on; the preamble declares it therefore not the case of a descent. The preamble speaks of a case where the death of the father may or may not happen before that of the child, therefore, not the case of a descent from him to the child.

Again: If they do not mean lands descending from the father, neither do they mean an estate descending from the mother; for the contemplation of these clauses is, that she may be alive, though the father be dead; it is to go to her, if the father be dead, for life. This cannot be meant of an estate coming from her by descent.

Again: These lands do not mean a descent from the mother, and neither do they mean a descent from the father; for they are predicated upon a case, in which there may be a deflexion of the heritable line by the accident of one person's dying before another, which deflexion is guarded against by the act of 1784, ch. 10, sec. 3; if the father be dead and the mother alive, that accident shall not change the heritable line. Is the case of the descent such an one? Take the case of a descent from the mother; if the child die before the mother, the husband is tenant by the courtesy after her death, and the inheritance goes to the heirs on the part of the mother: But if *by accident* the mother die first, and then the child die, the estate goes to the father and his heirs; if by accident the father die before the mother, and then she die, her estate goes to the son, and on his death without children, &c. to her relations; but if she die before the father, and then the son die without children, &c. the estate goes to the father's relations. If then a descent be included in these words, the act provides indeed against conveying the estate from the father's family by the accident of his death, but it causes the accident of the mother's death before the son's to carry the estate from her family: *incidit in Scyllam qui vult vitare Charybden*.— We take away one evil and plant another in its place. Before the latter act, if the father might succeed to her estate, she also had a chance of succeeding to his, supposing the words in question to mean a descent. But supposing they mean this, the latter act does token a great injury, by taking the chance from her, and by subjecting her estate to a liability of vesting in the father's family. The act could not intend this, and therefore the clauses speak of some other case than that of a descent; they cannot mean a case where it would be inconsistent with the preceding parts of the act, to carry the estate from the mother's family to the father's, by the accident of her death, before the death of the child. These words must be intended of some case where the general spirit of the act prefers the claims of the father's family. That case will be presently mentioned, and is not a case of lands descending from the mother. The words in question are not meant to comprehend the case of a descent from the father.— Because on the death of the husband if there be no child, the

widow is entitled to one third for life, the brothers and sisters, and for want of such, the uncles and aunts of the husband, to the fee simple. Why give her the whole, when by the death of the child, after that of the husband, she stands precisely in the same circumstances, as if there had been no child originally? Once more, they are not meant of a descent from the mother, because if the child die before the father, he is entitled to the estate for life, as tenant by the courtesy; why then give him the inheritance, when by the death of the child, after the mother, he stands precisely in the same circumstances as if at the death of the mother, the child had not been living? If then these words do not mean an acquisition by descent, what do they mean, consistently with the other parts of the act, and with the equality and justice we contend for? They mean an estate acquired neither by conveyance from a parent, nor by actual purchase, nor yet by descent from a parent; they mean an estate acquired by gift and conveyance, or by devise, or perhaps descent from some person other than a parent. Then will it not be unjust, nor inconsistent with the former parts of the act, if the father's family be preferred to the mother's. Then the mother's estate will not be carried into the father's family, to the exclusion of the mother's family. Then the uncles and aunts on her side, are not excluded from a share of the estate descended from her. Then the third and fourth clauses, introducing such uncles and aunts into the succession, where the child dies without children, and without brothers and sisters, will not be superseded. Then will the father and mother both stand an equal chance to succeed agreeably to the contemplation of the act. Then will appear the necessity, justice and propriety of saying that the accident of death, shall not carry the estate from the father's family, which as the act says, is found in all other instances, meaning in all instances except in cases of lands descending from the side of the mother. And then will not the land descending from the father, be carried into the mother's family, in exclusion of the uncles and aunts on the father's side. But such estate will descend to them according to the directions of the former part of the act, without the absurdity of giving the mother's estate to the father's family in all events; and without the contradiction of giving the father's heirs and family an estate, which the third and fourth clauses gives to the mother's heirs, in exclusion of his. And then will be satisfied the preamble to the fourth clause, stating the old rule of excluding the parents in all cases, to be often, not always, injurious in its consequences, thereby intimating that the alteration to be made in the old law, will be comprehensive of *some*, but not of *all cases*, where a child died intestate, without issue, and not leaving any brother or sister. Another idea which may now be mentioned is, that if lands be conveyed by the father to the son, they shall, on the death of the son without issue, brothers or sis-

ters, return to the parent from whom the same were derived by such conveyance: They cannot in any event go to the mother's family. And can we suppose that the same law which is so anxious to preserve the acquisitions of the father's family, in the same family, in the case of a conveyance, would not be equally anxious for the same thing, when the estate came by *descent* from the father's family? Why exclude the mother forever in the case of a *conveyance*, and introduce her in the case of a *descent*? This proves the words *otherwise acquired* do not mean to embrace the case of lands coming to the son by *descent* from his father.

If then the true meaning of the words *otherwise acquired*, only comprizes lands acquired by gift or conveyance, or by devise, or *perhaps* descent from some person other than a parent; and the other words in the clauses in question, only comprize lands conveyed by deed from a parent to his child, or *actually purchased* by the child; and if the case before the court be none of those, it follows, that the claim of the parent being not supported by either of the clauses of 1784, ch. 22, sec. 7, or 1784, ch. 10, sec. 3, is not supported by any law whatever; and that this case must be regulated by the other parts of the act, in the same manner as if the clauses in favor of the parent had not been introduced: and in that case we have seen that the land in controversy belongs to the defendant.

I am not apprized of the course which Mr. Brown's argument will take, and therefore I cannot say any thing to it: But I trust it cannot be of force enough to shew that the reasons we offer are not deserving of some attention.

*Brown* for the plaintiff. The great importance of this case, and the still greater importance of the question, demand that a circumspect and comprehensive view of the subject should be taken, and will excuse a slight reference to some common learning. The legislature, no doubt, have a right to regulate the succession to intestate estates, in such manner as will most promote the interest of the community. But if the public policy does not point out any particular rule, some of the relations of the deceased have claims which ought not to be disregarded. Of these, the claim of the parent is conspicuous, others are volunteers; but they appear as purchasers for the most valuable of considerations. They, and particularly the mother, have nursed the intestate in his infancy, watched over him in his sickness, and with great care, anxiety and expence raised him perhaps to manhood: The child then owes them gratitude and compensation, and if he dies without issue, it would be his duty, and we may presume that it would be his inclination also, to leave them his property. Accordingly, we find that in England and in this country, the statutes of distribution which are founded upon the duty and supposed inclination of the deceased, places the succes-



son of the parents of the intestate immediately after that of his children, and in Germany, reason was unable to decide between the equal pretensions of the intestate's parents and children, and therefore referred it to the chance of a battle. 2 Bl. Com. 504. With regard to lands however, the mother and the half blood were excluded from the succession by the feudal policy, which regulated the descent of real estates, in this country, till the year 1784, and continues to do so in England at this day.

The northern adventurers who overthrew the Roman Empire, found that they had by conquest, got possession of countries, the inhabitants of which were far more numerous than themselves : and in order to preserve both themselves and their conquests, they established that polity, to which we have given the name of the feudal system ; the object of which was to have an army of their own countrymen, always ready to defend the state against domestic insurrection, or foreign invasion. For this purpose, they seized and parcelled out the lands among themselves, to be held by the tenure of military services, on condition that the possessor should hold himself in readiness to serve in the army when called upon. This was sufficient provision for the time then present ; but in order to provide for the time then to come, it was also necessary that they should preserve the inheritance of those feuds in their own family ; for if those feuds passed into the hands of the conquered, it would be putting arms in their hands also : And as those adventurers were either under the necessity, or chose to marry with the conquered, they easily foresaw that if the mother or her children, by another husband, perhaps of the conquered, could in any case succeed, it would carry those lands, and with them, military power, into the families of the conquered. To guard against this, they established a number of very unnatural, but for them very politic, canons of descent ; one of which relating to the present subject, was, that the heirs should be of the blood of the first purchaser, who was their countryman, and was supposed to have acquired the feud on account of his personal merit : This guarded lands which had descended to the person last seized ; and then that in the collateral inheritance, the male stock should be preferred to the female, guarded all cases where the person last seized had purchased. If then, in England, the conquerors and conquered got amalgamated, and all distinctions between them lost, the reason of the rule ceased ; and the rule itself ought to have ceased also. The reason *never* applied to this country, nor ought the rule. These truths are acknowledged and verified by the preamble to the 3d and 7th sections of 1784, ch. 22 ; and also by the most intelligent and enlightened modern English writers : Paley's Mor. Phil. page 228, 9, 3. That spirit of inquiry and reformation which led to, and had been excited by the revolution, induced the legislature of this country, as soon

as the reformation of the government had been achieved, to get about reforming the law of succession to intestates. The duty and the presumed inclination of the deceased, had long been the governing principle in the succession to personal property; and there was now no reason why the succession to real property should not be governed by it also. Accordingly, the legislature, in April, 1784, ch. 22, in effect, enacted that we should no longer regard the blood of the first purchaser, or the dignity of the paternal line, but should be solely governed by proximity of blood, to the person last seized. This I think myself warranted in saying; although in some points, their prejudices seem to have got something the better of their principles. In support of this, I observe, that the act of April, 1784, ch. 22, sec. 3, enacts, "That if any person dying intestate, at the time of his or her death, be seized or possessed of, or have any right, title, or interest, in or to any estate or inheritance, in lands or other real estate, in fee simple, and without issue; such estate or inheritance shall descend to his or her brothers; and for want of brothers, to his or her sisters, as well those of the half blood as those of whole blood, to be divided amongst them equally, share and share alike, as tenants in common, and not as joint tenants; and each and every of them shall have, hold and enjoy, in their respective parts or portions, such estate or inheritance as the intestate died seized or possessed of, or entitled unto." This part of this section enacts, that where any person dies without issue, and intestate, seized of any estate or inheritance, without making any difference whether that estate was acquired by descent or purchase, it shall descend to the intestate's brothers, as well those of the half blood, as those of the whole blood, without giving any preference either to the paternal line, or those who are of the blood of the parent from whom the estate descended to the intestate. Then passing over for the present, the clause, providing always; in the latter end of the said section, it is provided also, that if any brother or sister of the intestate should have died in the lifetime of such intestate, leaving children, then those children shall stand in the place of their deceased parent. Then sec. 4 enacts, that the same rule of descent shall be observed amongst distant claimants and collaterals. *The same rule of descent*; that would be, giving no preference either to a paternal or maternal relation, or to the blood of the first purchaser, but solely regarding the proximity of kindred. Then what difference does the clause, beginning, *provided always*, make? I say, it proves the general principle, at the same time that it operates as an exception to it—*Exceptio probat regulam*. It provides only where the estate descends from one of the parents, and there are brothers and sisters of the half blood of the paternal and maternal line, that those who are of the half blood of the line from which the estate descended,

shall inherit solely to the exclusion of the other half blood. But it makes no further alteration; and therefore, if there were no half or whole blood brothers of the line from which the estate descended to the intestate, but half blood of the other line, that half blood would inherit, by virtue of the prior part of the section, to the exclusion of uncles and other relations of the line from which the estate descended: So that in cases where the land has descended from a parent, it respects the blood of the first purchaser;—for example, an estate descends to J. S. from his father; J. S. dies without issue, leaving brothers of the paternal line of the half blood: in such a case, the brothers of the paternal line of the half blood, would inherit solely, to the exclusion of the brothers of the maternal line of the half blood; but if J. S. had left brothers of the maternal line, and no brothers of the paternal line, then the maternal half brothers would inherit, to the exclusion of the paternal uncles, and all others. But in cases where the intestate had acquired the estate by purchase, this clause makes no alteration; so that there, proximity of kindred solely is regarded, and both half bloods inherit share and share alike, according to the first part of the section. Then section 4 enacts, that the same rule of descent shall be observed among distant lineals and collaterals; that is, that in cases where the intestate has acquired the estate by descent, and where the claimants are in equal degrees of kindred, the blood of the first purchaser shall prevail; but where the claimants are not in equal degrees of kindred, then proximity of kindred shall be preferred, without any regard to the blood of the first purchaser: and in all cases where the intestate has acquired the estate by purchase, proximity of kindred shall prevail, without giving any preference either to the paternal line, or to the blood of the first purchaser.—For example; J. S. dies intestate, without issue, and without brothers or sisters, or the issue of such; being at the time of his death, seized in fee simple, of a real estate, which had descended to him from his father, and of another which he had purchased; having one paternal and one maternal uncle; in such a case by this law, the paternal uncle would take the whole of the estate which J. S. had inherited from his father; and the one which J. S. had purchased, would be equally divided between his said two uncles. But suppose there had been no paternal uncle, and a grand uncle had been the nearest relation of the paternal line; in such a case the maternal uncle would have inherited the whole of the real estate of J. S. as well that which he had inherited from his father, as that which he had purchased. This I take to be the true exposition of sec. 3 & 4; and if so, it will by shewing the principle which the legislature had adopted, and the spirit by which it was actuated, be of use in the future construction of section 7, on which the present question arises; but though useful, I hope it will be found

not to be absolutely necessary: but the construction I shall contend for, stands upon other plain and firm grounds—so that if I should be mistaken in what I have hitherto advanced, still the plaintiff will be entitled to recover. The legislature, having by sections 2, 3 and 4, regulated the succession of lineal descendants and collaterals; it then only remained to arrange the succession of the parents, which is the declared object of section 7; which, in a preamble, recites the mischief intended to be remedied, “*That where any person seized of an estate of inheritance, (no matter whether that estate was acquired by purchase or descent) dies intestate, and without issue, and not leaving any brothers or sisters, such estate descends to some collateral relation, notwithstanding that the intestate may have parents living.*”—This the legislature consider as a thing not founded in reason, and iniquitous; and therefore propose remedying it in the enacting part, which follows immediately in the same section, before their idea got cold; and enacts, “*That in case of any person dying intestate, possessed of an estate of inheritance, without leaving an issue, nor having any brothers or sisters, half blood or whole blood, or the lawful issue of such, who shall survive, the estate of such intestate shall be vested in fee simple, in his or her parent from whom the same was derived.*”

Both parties are agreed that this provides evidently for the case of a gift by a parent; for the estate is to revert in the parent from whom the same was derived, on the supposition that that parent would be alive; which could not be in any other case but that of a gift by a parent. If the lands had descended from a parent, that parent must have been first dead. The expression is *derived*, not *descended*, and vests in the *parent*, not in the heirs of the parent. This re-vesting was only to take place where the intestate died, without leaving any issue, or any brothers or sisters, or the lawful issue of such who should survive; so that if the land had been given by the father, and there had been a brother or sister of the maternal line of the half blood, that brother or sister would have taken, in exclusion of the father: and so, if the lands had been given by the mother, &c. So much was the legislature disposed to regard proximity of blood, to the person first seized, and to look no further than follows: “*or if such estate were actually purchased, or otherwise acquired by such intestate, then the same shall be vested in the father of such intestate, if living, but if dead, then in the mother of such intestate, and her heirs.*” It would be mispending time to dispute about the meaning of the expression, *actually purchased*; suffice it to say, that it is one means of acquiring a real estate; and if *descent* is another means of acquiring a real estate, the present case is surely within the words *otherwise acquired*, being an estate acquired otherwise than by actual purchase; and under the present circumstances the mother ought to succeed. First, because the words

are extensive enough, to include the case of descents and all other cases; and are so used by the most correct and approved law writers—2 Bl. C. 200, 241. 2 Wood. Vin. Lec. 250, 263. E. Hardwick law of forfeiture, 7. &c. These three authors may with propriety be said to be the most accurate, scientific and elegant writers on the English law, and shew in the places cited, and others, that acquiring an estate signifies getting by any means whatever, and does expressly include *descents*. If necessary, many others may be cited. Then the maxim, *expressio generatim intelligitur generaliter* applies, and the courts both of law and equity, will not restrain a general expression even in the case of a will, unless they see abundant cause to think it was used in a restrained sense. 2 Bl. Re. 79. 1. H. Bl. Re. 226. If this rule obtains in the construction of wills, it ought surely to govern in the construction of statutes, where the legislature can never be presumed to use an expression, without knowing and intending its utmost legal import. Secondly; that construction is to be put upon a statute which will suppress the mischief and advance the remedy. 1 Bl. Com. 37. Then what was the mischief which subsisted at the common law, and which it was the intention of the legislature to remedy, by the enacting part of this section? The legislature itself has in the preamble declared, that the mischief was, when any person seized of a real estate in fee simple, dies without issue, intestate, and not leaving any brother or sister, such estate descends to some collateral relation, notwithstanding that the intestate may have parents living. This being the mischief, the plain remedy of it would be, to say that where any person seized of a real estate in fee simple, dies intestate, without issue, not leaving any brother or sister, that the estate shall not descend to a collateral relation, where a parent is living, but shall vest in the parent. I hope I have already shewn that the words of the enacting clause do in effect, say so; that they not only admit, but require such a meaning; and I now add, that if there was a doubt of it, it ought to be allowed them, in order to suppress the mischief, and advance the remedy. If it should be held with the counsel for the defendant, that the enacting clause does not extend to cases where the real estate accrued to the intestate by *descent*; then in a great majority of cases, where a person seized of a real estate in fee simple, dies intestate, without issue, and not leaving brothers or sisters, or issue of such, such estate would descend to some collateral relation, notwithstanding that the intestate might have parents living—which is the very mischief intended to be remedied. Such a construction would be applying only a partial remedy, to a general mischief denounced by the legislature in the most comprehensive terms. Thirdly; because if the case where the intestate acquired the estate by inheritance or purchase, are both comprehended, as I

contend they ought, within the expression, *otherwise acquired*, then the whole section will amount to this: where the lands have been derived from a parent, they should revert in that parent, if living, to the exclusion of the other parents; and so both parents are considered nearer in blood than uncles, &c. The estate, however acquired, shall vest in either parent in preference to an uncle, or any more distant relation, which is in the same spirit and consistent with the general principle which I have already attempted to shew, that the legislature had adopted in the act, that of regarding the blood of the parent from whom the estate came to the intestate, when the claimants were in equal degree of proximity as both parents; and of solely regarding proximity of kindred, where one of the claimants was nearer in kindred than the others, as in a contest between a parent and a collateral relation. Fourthly; if lands which have been inherited by the intestate, are, with the defendant's counsel, held not to be comprehended under the expression, *otherwise acquired*, many flagrant absurdities will ensue; as if the mother in the present case had married again, and had a child before the death of her son, S. J. S. her child by the second husband, would unquestionably have inherited, although it was not of the paternal line, nor of the blood of the first purchaser; which, I think, ought to silence all clamours on these two favorite topics. And would it not be a flagrant absurdity to permit the child to succeed on account of the inheritable blood it derived from its mother, and still to say, that that mother cannot succeed on account of her not having any inheritable blood? Again; suppose, what is really this case, that the estate now in dispute, descended to S. J. S. from his paternal grandfather; the defendant is sister of the half blood, by the mother's side, to John Swann, the father of the said S. J. S.—the mind can scarcely trace the relationship; she is no relation whatever to his grandfather; is not of the paternal line, nor of the blood of the first purchaser; and if she succeeds as according to their construction, she must, it must be solely on the score of his proximity of kindred to S. J. S. the person dying last seized; would it not be a flagrant absurdity to say his grandfather's daughter on the score of proximity of kindred to S. J. S. should succeed to him in preference to his own mother? It would in effect be saying, that his grandmother's daughter was more nearly related to him than his own mother; than which, nothing could be more ridiculously absurd. Other absurd consequences might be pointed out, but let these suffice. An objection has been taken to our construction, and founded on the provision, *that the lands shall be vested in the father, if living, but if dead, then in the mother of such intestate, and her heirs*. It has been said, that from this it appears that in the cases intended to be provided for, both parents might,

be alive at the death of the child dying seized, which cannot be in any case of descent, as one of the parents must be dead before the descent takes place; and that therefore the legislature could not mean to comprehend cases where the lands had descended to the intestate under the expression, *otherwise acquired*. The answer to this objection appears to be easy. In the first place, it is not correct to say that both parents cannot possibly be alive when a child dies seized of a real estate which it had inherited: for suppose baron and feme have issue; two sons—one of whom having acquired a real estate, dies seized thereof, in fee simple, intestate, and without issue, this estate unquestionably descends to his brother, who may in the life of both his parents, die intestate, and without issue, being seized of the estate which he inherited from his brother. As this is a case which may happen very often, the legislature must have foreseen it; and it would have been unpardonable in them not to have provided for it, as they have in this provision. Another answer to this objection, is, that the legislature had in the preamble, remedied a mischief which happens when any person is seized, either by purchase or descent, of a real estate, in fee simple, &c. Then in the enacting clause, after making particular provision for the case where a person being seized in fee simple, of a real estate, which had been derived by a gift from a parent, dies intestate, and without issue in the lifetime of that parent, the legislature proceeds to provide for cases, where such estate was actually purchased or otherwise acquired by such intestate; by which we contend, they meant, it was acquired either by descent or purchase, except by a gift from a parent: and thus having it in contemplation to regulate the succession in every possible case where the lands had been purchased or inherited, except the case of a gift from a parent, where the parent is alive, and at the death of the intestate it was necessary to direct how the estate should descend, when both parents were alive at the death of the child, as well as where one only survived. In all cases where the intestate had purchased the lands, and in many where he had inherited them, both parents might be alive at his death; and surely these must be provided for, although in other cases of descents, one of them only could be alive. The legislature was making a general provision both for the one and the other. Another objection has been extracted from the proviso, in the latter part of section 7; “*and if the mother of such intestate be dead, then in the heirs of such intestate on the part of the father; and for want of heirs on the part of the father, then to the heirs of the intestate on the part of the mother.*” It has been said, that if the case where lands had descended to the intestate, are included in the expression, *otherwise acquired*, then, by this clause, if the intestate had inherited lands from his mother, and

his father is dead as well as his mother, then on the death of the intestate, these lands would vest in the heirs on the part of the father, to the exclusion of the heirs on the part of the mother; which would be contrary to what the legislature had just enacted in sec. 3 and sec. 4, by which when the claimants are in equal degrees of proximity of kindred, the blood of the parent from whom the estate descended, is to be preferred: And then it is added that such a construction ought, if possible, to be made as to prevent two parts of the same act contradicting each other. And all this is true; but of this clause I would observe *that* it was not necessary to effectuate the object which the legislature had *in view*, when they passed the section, of which this clause is a part. The legislature have, in the preamble, in effect declared, that *their sole view* in passing this section, was to regulate the succession of these heirs in the distant collateral relations of the intestate. Secondly; this clause is not necessary at all, for its object had been completely provided in section 4, where the succession of descents to collaterals is in every possible case provided for. Thirdly; if this clause is allowed any operation, there will be no general uniform principle of succession to intestates; for in the succession of brothers and sisters and the issue, no preference will be given to the paternal line, and the mother's son will succeed equally with the father's; but in the succession of more distant collateral relations, preference will be given to the paternal line, and the mother's brother will be postponed to the most distant relation on the part of the father. Fourthly; this provision is repugnant to the spirit of the whole of the rest of the act, inasmuch as it gives a preference to the paternal line; whereas the rest of the act places the maternal line on a perfect equality with it. Fifthly; this provision is repugnant to the other positive regulations of this act. We have seen that section 3 and section 4 had enacted, that the nearest relation, whether paternal or maternal, should in all cases succeed; and where they were in equal degrees of proximity, they, both paternal and maternal, should succeed, share and share alike, unless where the estate came to the intestate by descent, where the blood of the parent from whom the estate descended, was to succeed. But this clause enacted that the paternal line shall in all cases inherit, to the exclusion of the maternal line.—For example, if the heir on the part of the father is the nearest relation of the intestate, then he would be entitled to the whole by sections 3 and 4, without the aid of this clause; if the heir on the part of the mother, then according to this clause, he would be entitled to the whole; but according to sec. 3 and 4, only share and share alike, with the heir on the part of the mother; unless in the case of a descent from a parent, where the blood of that parent shall succeed; and if the heir on the part of the father is a more distant relation



son to the intestate, than the heirs on the part of the mother, still, according to this clause, he would be entitled in every case to succeed to the whole. But according to sections 3 and 4, he would in no case be entitled to succeed to any part; and then they are in every case where this clause can have any operation whatsoever, directly at points. If I might be permitted to hazard a conjecture, I would say that under those circumstances, this clause ought to be looked upon as an amendment, proposed by some busy, conceited ignoramus, and passed by the legislature without due consideration; and that it ought to be considered as void, on account of its repugnance; 1 Bl. Com. 89: and if considered as void, then any argument drawn from it falls to the ground.

But even suppose the court should think that this clause ought not to be considered as void, but that section 4 should be held to be void; for if of two contradictory parts of the same act, one must be void, then I say that the operation of this clause, when applied to cases where the estate had been purchased by the intestate, is, and has been shewn to be, as contrary and repugnant to section 3 and 4, as it is when applied to cases, where the intestate had inherited the estate; yet the construction admits, and every construction must admit, that its operation extends to all cases of purchase, so that their own argument militates just as much against their construction as ours, and of course the court ought not to establish that construction drawn from this clause, to the prejudice of either side, as it equally operates against both. All that has been said about the hardship of the estate passing from one family to another, is considered by me as mere declamation; as a song of prejudice, which might be just as easily hummed over against the tenant in fee simple having power to alien in his life time, or to devise at his death: it certainly oppugns their claim, fully as much as it does ours. The hearts of a family cannot be more attached to a piece of land than to their negroes, who have been the humble companions of their infancy and youth; yet negroes are every day passing from one family to another, in the manner we contend this land ought to pass; and it is very seldom we meet with a person so wrong-headed or prejudiced as to complain of it. Some other objections were urged against our construction, but they were so subtle and metaphysical that some of them exceeded my comprehension, and the rest I have forgotten.—However, I believe those which I have attempted to answer, are the most specious, and were most relied on. Some fine spun arguments might be drawn from the act of 1784, c. 10, s. 3, but I think it unnecessary to trouble the court with them, because I think a question of this magnitude should not be decided on refinements and subtleties, and 2dly because that section is too inaccurately drawn, to

serve as any good guide. The enacting clause only lessens the mother's estate, from an estate in fee simple, to an estate for life; and the preamble does not declare what the legislature intends to do, so much as it declares in a dark and obscure manner what *that* legislature thought the preceding legislature had done, a subject on which if that legislature had expressed an opinion ever so fully and unequivocally, still that opinion would have been unconstitutional, and entitled to no weight.

For these reasons, it appears that according to both the letter and spirit of the before mentioned statutes, the mother is entitled to an estate for life at least, and consequently that there ought to be judgment for the plaintiff.

*Curia advocari vult.*

### *Rutherford vs. Craik's executors, and others.*

**T**HE plaintiff claimed under the will of Jane Corbin, all that she was entitled to under the marriage settlement between her and Thomas Corbin, prior to the marriage: particularly, they claimed all the *increase* of the Negroes mentioned in the deed whereby the marriage settlement was made, and a widow's share, under the act of distributions, of the one half of the original stock of Negroes, secured by that deed to Corbin, who died before her, intestate. They made other claims besides, but these were the claims upon which lay the stress of the argument.

The deed recited, that on that day, 28th of October, 1761, the said Jane Innis and Francis Corbin, as well for and in consideration of a marriage, by God's permission, intended shortly to be had and solemnized between the said Francis Corbin and Jane Innis; and if the sum of twenty shillings sterling money of Great Britain, by Samuel Swann and John Swann, to the said Jane Innis in hand paid, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged; and for and towards settling and assuring the several plantations, tracts or parcels of lands, tenements and hereditaments, *and Negro slaves*(1) *and their increase*, plate, household goods, and stock of horses, cattle, hogs and sheep; *the estate of her*, (2) *the said Jane Innis*, hereinafter mentioned to be granted in trust, to and for the several uses, intents and purposes, and subject to the powers, provisos, limitations and agreements hereinafter limited, declared and expressed; and for divers other good causes and considerations hereunto especially moving, she, the said Jane Innis, by and with the consent, direction and appointment of the said Francis Corbin, testified by his being party to, and signing and sealing these presents, hath granted, bargained, sold, aliened, released and confirmed, and by these presents doth fully, clear-

by and absolutely grant, sell, alien, release and confirm unto the said Samuel Swann and John Swann, in their actual possession, now being by virtue of a bargain and sale to them thereof made for one year, in consideration of ten shillings, sterling money of Great Britain, by indenture bearing date the day next before the day of the date of these presents, and by force and virtue of the statute for transferring uses into possession, and to their heirs and assigns, all those the three plantations, tracts or parcels of land of her, the said Jane, lying and being on the easternmost branch of long creek, in New Hanover county, containing in the whole, twelve hundred and sixty acres; also all that other plantation, tract or parcel of land of her, the said Jane, lying and being on the north east side of the north west branch of Cape Fear river, joining the upper side of the late Henry Simons' land in Bladen county, containing three hundred and twenty acres; also all that other plantation, tract or parcel of land of her, the said Jane, containing one hundred and eighty acres, lying and being in Bladen county, on the west side of the north west branch of Cape Fear river, joining M'Night's land, together with all the houses, out houses, edifices, buildings, orchards, gardens, lanes, meadows, trees, woods, ways, paths, waters, water courses, easements, profits, commodities, advantages, emoluments and hereditaments whatsoever, to the said several plantations, tracts or parcels of land or either of them, belonging or any wise appertaining; and the reversion or reversions, remainder or remainders, rents, issues and profits thereof, and of every part or parcel thereof; and all the estate, right, title, interest, use, trust, possession, property, claim and demand of her, the said Jane Innis, of, into or out of, the said several plantations, tracts or parcels of lands, tenements and hereditaments, and premises and every of them; to have and to hold the said several plantations, tracts or parcels of lands, tenements and hereditaments, and all and singular other the premises, unto the said Samuel Swann and John Swann, their heirs and assigns, in trusts; nevertheless to and for the several uses, intents and purposes, and subject to and under the several powers, provisos, limitations and agreements hereinafter and by these presents limited, declared and expressed. And this indenture further witnesseth, that for the consideration aforesaid, and in consideration of the sum of ten shillings, like sterling money, to the said Jane Innis, in hand paid by the said Samuel Swann and John Swann, at or before the en- sealing and delivery of these presents, the receipt whereof is hereby acknowledged, she, the said Jane Innis, by and with the consent, direction and appointment of the said Francis Corbin, also testified by his being party to and signing and sealing these presents, hath granted, bargained, sold, aliened and confirmed, and by these presents doth grant, bargain, sell, alien and confirm unto

the said Samuel Swann and John Swann, their heirs and assigns, all that tract or parcel of land, situate, lying and being in New-Hanover county, containing three hundred and twenty acres, being the plantation whereon the said Jane Innis now dwells, and called or known by the name of Point Pleasant; and also all that other tract or parcel of marsh land, containing one hundred acres, lying and being in the county aforesaid, across the river, opposite to the plantation aforesaid; and also all the houses, out houses, tenements, gardens, orchards, trees, woods, underwoods, profits, commodities, advantages, hereditaments, ways, waters and appurtenances whatsoever, to the said plantation, tracts or parcels of land abovementioned, belonging or in any wise appertaining; and also the reversion and reversions, remainder and remainders, rents and services of the said premises, and of every part thereof, and all the estate, right, title, interest, claim and demand whatsoever, of her, the said Jane Innis, of, in and to the aforesaid two several tracts or parcels of land and premises, and every part thereof; to have and to hold the said two tracts or parcels of land and tenements, and all and singular the said premises with the appurtenances above mentioned, and every part or parcel thereof unto the said Samuel Swann and John Swann, their heirs and assigns for, and during the natural life of the said Jane Innis, in trust; nevertheless to and for the several uses, intents and purposes, and subject to, and under the several powers, provisos and limitations and agreements hereinafter by these presents limited, declared and expressed. And this indenture further witnesseth, that for the consideration aforesaid, and in consideration of the sum of ten shillings like sterling money, to the said Jane Innis in hand paid by the said Samuel Swann and John Swann, at or before the enrolling and delivery of these presents, the receipt whereof is hereby acknowledged, she, the said Jane Innis, by and with the consent, direction and appointment of the said Francis Corbin also testified by his being party to and signing and sealing these presents, hath granted, bargained, sold, assigned, set over, transferred, and by these presents doth fully, freely and absolutely grant, bargain, sell, assign, set over and transfer unto the said Samuel Swann and John Swann, their executors, administrators and assigns, all and singular her *Negro slaves* (3) *following*, by name, Peter, Johnny, Peter, jun. Rutherford, Mingo, March, Ben, Sinclair, jun. Exeter, Bob, George, Quomino, Cato, Monrow, Murray, Jemmy, Cyrus, Canisby, Sinclair, Cuffe, Jamaica, Tom, David, Mundingo, Charles, Charles, Betty, Murry, Caesar, Southerland, Ross, Solomon, Anthony, Carthness, Cain, Cudjo, Douglass, London, Sentry, Jimboy, George, jun. Shields, Sandy, Caesar, Nancy, Pæbe, Lucretia, jun. Uphamia, Victoria, Jenny, Barbary, Violet, Lucretia, Dolla, Celia, Carolina Jenny, Dinah, Mary, Jen-

my Murray, Nanny, Guy, Jenny Pollard, Bell, Sarah, Minah, Patient, Peggy, Polly, Nancy, Delta, jun. Belindah, Dinah, jun. Stairra, Suckey, Dinah, Betty Maze, Nanny, Rose, *together with their* [4] *future increase*; also all the plate, household goods, stocks of horses, black cattle, sheep, and hogs, and all other the personal estate of her, the said Jane Innis, wheresoever to be found in the province of North-Carolina or elsewhere; to have and to hold, all and singular the said *Negro slaves, together with their* [9] *future increase*, plate, household goods, stocks of horses, black cattle, sheep and hogs, and every of them, and all the other personal estate aforesaid, of her, the said Jane Innis, by these presents granted, bargained, sold, assigned, set over and transferred, mentioned or intended to be granted, bargained, sold, assigned, set over and transferred unto the said Samuel Swann and John Swann, their executors, administrators and assigns in trust; nevertheless, to and for the several uses, intents and purposes, and subject to and under the several powers, provisoes, limitations, conditions and agreements hereinafter by these presents limited, declared and expressed. And this indenture further witnesseth, that in consideration of the said intended marriage, and of the great love and affection the said Francis Corbin hath and beareth to the said Jane Innis, and of the sum of twenty shillings sterling money of Great-Britain, to the said Francis Corbin, in hand paid by the said Samuel Swann and John Swann, at or before the enscaling and delivery of these presents, the receipt whereof is hereby acknowledged, he, the said Francis hath granted, bargained, sold, aliened, released and confirmed, and by these presents doth fully, clearly and absolutely, grant, bargain, sell, alien, release and confirm unto the said Samuel Swann and John Swann, in their actual possession, now being by virtue of a bargain and sale to them thereof made for one year, in consideration of ten shillings sterling money of Great-Britain, by indenture bearing date the day next before the day of the date of these presents, and by force and virtue of the statute for transferring uses into possession, and to their heirs and assigns, *all that* [6] *lot or half acre of land, and wharf of him, the said Francis, lying and being in the town of Edenton, in Chowan county, purchased by the said Francis, of Thomas Barker, Esq. also all that island and the marsh thereunto belonging, purchased by the said Francis, of the executors of James Craven, Esquire, deceased, lying and being near Edenton, in Chowan county aforesaid, called and known by the name of Strawberry Island, together with the houses, out houses, improvements, and all other the appurtenances to the said lot and wharf and island belonging or any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof, and all the estate, right, title, interest,*

use, trust, possession, claim and demand of him, the said Francis Corbin, of, in and to or out of the said lot or half acre of land, wharf, houses, island and marsh, tenements, hereditaments and premises, and every of them; to have and to hold the said lot or half acre of land, wharf, island and marsh, houses, tenements, and all and singular other the premises last mentioned, and parcel thereof, with the appurtenances, unto the said Samuel Swann and John Swann, their heirs and assigns, in trust; nevertheless, to and for the several uses, intents and purposes, and subject to, and under the several powers, provisos, limitations and agreements hereinafter by these presents limited, declared and expressed: And it is hereby declared and agreed by and between all the said parties to these presents, that the said Samuel Swann and John Swann, their heirs, executors and administrators, shall hold and be seized of all and singular the said lands, islands, lot, wharf, messuages, houses, tenements and hereditaments, and have, hold and possess all the *Negro slaves and their future* [7] *increase*, plate, household goods, stocks of horses, black cattle, sheep and hogs, and all and singular other the premises to them herein before and hereby granted and sold as aforesaid, to the several uses following; that is to say; as to all and singular the lands, tenements and hereditaments, in the several counties of New-Hanover and Bladen, *and the Negro* [8] *slaves*, plate, household goods, stocks of horses, black cattle, sheep and hogs, & every of them, the real and personal estate of the said Jane Innis, to the use and behoof of the said Jane Innis and her heirs and assigns, until the said intended marriage shall be had and solemnized; and from and after the said intended marriage shall be had and solemnized, to the only use of the said Samuel Swann and John Swann, their heirs, executors, administrators and assigns, in trust; nevertheless, that the said Samuel Swann and John Swann, and the survivor of them, and the heirs, executors and administrators and assigns of such survivor shall receive and pay the clear *rents, issues and profits of the* [9] *aforesaid* lands, tenements and hereditaments in the counties of New-Hanover and Bladen, all reasonable deductions being first made from time to time, yearly and every year, or oftener if conveniently may be; *and shall also permit and suffer the said Jane Innis* [10] *to receive all the profits arising by the negro slaves aforesaid, either from their labor, increase or hire*; and also that shall or may in any manner arise from all and every other part of the personal estate of the said Jane Innis aforesaid, for and during the term of *her natural* [11] *life* for her separate use and benefit, exclusive of the said Francis Corbin, her intended husband, and so that the same, or any part thereof, shall not be subject to the controul, disposition, debts, forfeitures, incumbrances or contracts of the said Francis Corbin, her intended husband; and that

all such sum or sums of money as shall be paid unto her during her coverture shall be paid into her own hands or to such person or persons as she, the said Jane Innis, shall by writing signed with her name, of her own hand writing, direct or appoint; and that her own receipt shall be a sufficient discharge for the same, unto Samuel Swann and John Swann, or any other person whatsoever, notwithstanding her coverture. *And from and after the decease of the said Jane Innis*, then they, the said Samuel Swann and John Swann and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, shall stand and be seized of those, the said three plantations, tracts or parcels of land, lying and being on the easternmost branch of Long Creek, in New Hanover county, containing in the whole, twelve hundred and sixty acres; and also of those other two plantations, tracts or parcels of land in Bladen county, the one joining the upper side of Henry Simons' lands, and the other joining M<sup>r</sup>. Night's lands; and shall have, hold and possess *the Negro* [12] *slaves* and other the personal estate aforesaid, of her, the said Jane Innis, in trust, for the uses, intents and purposes following; that is to say, *so much of the said* [13] *lands, Negro slaves* and other the personal estate of the said Jane Innis aforesaid, not exceeding the one half thereof, or the sum of two thousand pounds proclamation money, to be raised and paid by the said trustees, and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, out of the whole real and personal estate aforesaid of the said Jane Innis, (whichever the said Jane shall be minded to give and dispose of,) to the use and behoof of such person or persons, his or their heirs and assigns forever, to whom the said Jane, whether covert or sole, and if covert, notwithstanding her coverture shall, by any deed or writing, last will and testament, or other writing, purporting her last will and testament, attested by two or more creditable witnesses, *give, devise,* [14] *direct or appoint the same, and for the want of such direction and appointment, to the use of the said Francis Corbin, his heirs or assigns for ever, and the other half or remaining part of the said lands, Negroes, and of other the personal estate of the said Jane Innis, to the use and behoof of the said Francis Corbin, his heirs and assigns forever*: And as for touching and concerning the said lot or half acre of land and wharf, with the tenements and appurtenances thereto belonging and appertaining, lying and being in the town of Edenton, in Chowan county, and the said island called Strawberry Island, and marsh thereto belonging, lying and being near Edenton, in Chowan county aforesaid, the estate of the said Francis Corbin to the use and behoof of the said Francis Corbin and his heirs, until the solemnization of the said intended marriage, and from and after the said intended marriage shall be had and solemnized, to

the use and behoof of the said Francis Corbin and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste, and from and after the determination of that estate, to the use and behoof of the said Samuel Swann and John Swann, and their heirs, during the natural life of the said Francis Corbin, in trust, to preserve the contingent uses herein after limited from being barred and destroyed, and for that purpose to make entries and bring actions as the case shall require, yet so as to permit and suffer the said Francis Corbin to receive the rents and profits of the said last mentioned premises for and during his natural life, *and from and after his decease, [15] then to the use and behoof of the said Jane Lunis, his intended wife, and her assigns, for and during the term of her natural life without impeachment of or for any manner of waste,* and from and after the decease of the said Francis Corbin and Jane, his intended wife, and the longest liver of them, to the use and behoof of the said Francis Corbin, his heirs and assigns for ever: Provided always, and it is declared and agreed by and between the said parties to these presents, that it shall be lawful to and for the said Francis Corbin, during the term of his natural life, and from and after his decease, to and for the said Jane, during the term of her natural life, as when the said Francis Corbin and Jane shall be in the actual possession of the said last mentioned premises limited to the said Francis Corbin and the said Jane Innis during their several and respective lives, by any deed or deeds attested by two or more creditable witnesses, to demise, lease or grant the said or half acre of land and wharf, with the tenements, hereditaments and appurtenances thereto belonging, and the aforesaid island and marsh, with the appurtenances thereto belonging, to any person or persons, for and during the term of the respective life of the said Francis or Jane, and no longer, for and upon such rents as to the said Francis or Jane shall seem meet and convenient, so as every such lease contain a condition for re-entry for non-payment of the rent thereby to be reserved, and so as every such lessee do execute a counter part of such lease; any thing herein to the contrary notwithstanding. Provided also, and it is hereby further declared and agreed by and between the said parties to these presents, that it shall and may be lawful to and for the said Jane, notwithstanding her coverture, and as if she were sole and unmarried by any deeds, writing or writings, signed by her, with her name, of her own hand writing, sealed and delivered in the presence of two or more creditable witnesses, with the consent of the said Samuel Swann and John Swann, and the survivor of them, and the heirs of such survivor, testified by their being parties to such deed or deeds, to make any lease or leases, demise



presents, of all or any of the lands limited to the said Samuel Swann and John Swann and their heirs, in trust for the sole and separate use and behoof of the said Jane Innis as aforesaid, to any person or persons, for the term of the natural life of the said Jane and no longer, for and upon such rents as the said Jane can agree for or shall think meet and convenient: And also for the said Jane from time to time, and all times hereafter, during her natural life, and when she shall be so minded, *notwithstanding her [16] coverture, and as if she were sole and unmarried, to have and take upon her the whole and sole care, ordering, direction and management of the Negro slaves, and all other the personal estate herein before limited to the said Samuel Swann and John Swann, their executors, administrators and assigns, in trust for the sole and separate use of the said Jane as aforesaid; and to receive, have, take and dispose of the profits arising from the same and every part thereof, either by the labour, hire and increase of the Negro slaves, increase of the stocks of horses, black cattle, sheep and hogs, or otherwise, at her will and pleasure, and in such manner [17] as she shall please or think fit, without the controul, inter-railing, interruption, let or hindrance of the said Francis Corbin, her intended husband, any thing herein before contained to the contrary notwithstanding. Provided also, and it is hereby further declared and agreed by all the said parties to these presents, that it shall and may be lawful to and for the said Francis Corbin and the said Jane, his intended wife, at any time during her natural life, notwithstanding her coverture, with the consent of the said Samuel Swann and John Swann or the survivor of them, first had in writing, attested by three or more creditable witnesses, and if the said Samuel Swann and John Swann shall both of them be dead, then for the said Francis Corbin and Jane Innis, without such consent, by any writing or writings by them to be signed and sealed in the presence of three or more creditable witnesses, and proved, the said Jane being first privately examined, touching her consent and agreement thereto, in due form of law (and not otherwise) to revoke all or any of the use and uses, trusts, estates and limitations herein before limited and declared of or concerning the said lands, Negro [18] slaves and their increase, plate, household goods, stocks of horses, black cattle; sheep and hogs, herein before mentioned, and by the same writing or writings, or by any other deed or deeds signed, sealed, executed, attested and proved as aforesaid, (the said Jane being first privately examined as aforesaid,) absolutely to sell [19] and dispose of the said lands, Negro slaves, plate, household goods, stocks of horses, black cattle, sheep and hogs, or any of them, to such person or persons, to such uses, intents and purposes as they, the said Francis Corbin and the said Jane, his intended wife, shall limit, declare or appoint; any thing*

herein before contained to the contrary notwithstanding: And the said Francis Corbin and Jane Innis do hereby severally covenant, promise and agree to and with the said Samuel Swann and John Swann, their heirs, executors and administrators, that the said lands and every of them, with their and every of their appurtenances, *and Negro* [20] *slaves*, plate, household goods, stocks of horses, black cattle, sheep and hogs and premises, and all and every of them, shall and may be at all times from henceforth peaceably and quietly held and enjoyed by the said Samuel Swann and John Swann, and their heirs, executors, and administrators according to the several uses and estates, and upon and under the several trusts, and subject to the several provisos herein before mentioned, limited, expressed or directed, touching and concerning the same; and further, that they, the said Francis Corbin and Jane Innis, shall and will at all times hereafter, upon the reasonable request of the said Samuel Swann and John Swann, make, do or execute, or cause or procure to be made, done and executed, all and every such further and other lawful and reasonable grants, acts and assurances in law whatsoever, for the further, better and more perfect granting and assuring of all and singular the said lands with the appurtenances *and the* [21] *Negro slaves*, plate, household goods, stocks of horses, black cattle, sheep and hogs and premises, and every of them above mentioned, to and for the several uses, intents and purposes, and under the trusts and subject to the provisos herein before contained, according to the true intent and meaning of these presents, as by the said Samuel Swann and John Swann or the survivor of them, the heirs, executors and administrators of such survivor, or their or any of their counsel learned in the law, shall be reasonably devised or advised and required. And whereas it is agreed by and between the said Francis Corbin and Jane Innis, that in case the said intended marriage shall take effect, and that the said Jane shall survive the said Francis Corbin, that then and in that case, the heirs, executors, administrators and assigns of the said Francis Corbin shall out of the other estate whatsoever of the said Francis (not in these presents before mentioned) or out of profits arising therefrom pay *to the said Jane*, yearly [22] *and every year, the yearly sum of one hundred and twenty pounds proclamation money*, being the yearly interest, at six per cent. of the sum of two thousand pounds like money. Now this indenture further witnesseth, that the said Francis Corbin for and in consideration of the said intended marriage, for himself, his heirs, executors and administrators, *and every of them*, [23] *promise and grant to and with the said Samuel Swann and John Swann, their heirs, executors and administrators*, that in case the said intended marriage shall take effect, and the said Jane shall survive him, the said Francis Corbin,

that then and in that case the heirs, executors, administrators and assigns of the said Francis Corbin *shall out of the [24] other estate whatsoever of him, the said Francis Corbin, and of which he shall or may die possessed, or at any time of his decease be entitled to, (not in these presents before mentioned) or out of the profits arising therefrom,* pay to the said Jane, yearly and every year, the yearly sum of one hundred and twenty pounds proclamation money : Provided always and lastly, and it is hereby expressed, declared and agreed to be the true intent and meaning of these presents and of the said parties, that the said Samuel Swann and John Swann, their heirs, executors and administrators and assigns shall not, nor shall any of them by virtue of these presents, nor shall they or either of them be charged or chargeable with the receipts, payments or acts of the other of them, but each of them for and with his own receipts, payments and acts only and not otherwise ; nor shall they or either of them be charged or chargeable with any loss or losses that may happen by reason of insolvency of or by the said Francis Corbin or Jane, his intended wife, or either of them, or of or by any other person or persons whatsoever : And that they the said Samuel Swann and John Swann, their heirs, executors and administrators shall be paid from time to time out of the trust estates aforesaid, all such costs, charges, damages and expences which they or either of them, their or either of their executors or administrators shall pay, bear or be put unto by virtue or reason of the trusts hereby in them reposed, or the execution thereof or otherwise relating thereto ; any thing herein before contained to the contrary thereof in any wise notwithstanding.

In witness whereof, the said parties within mentioned, have to these presents interchangeably set their hands and seals, the day and year first above written.

Upon this deed, this defendant's counsel insisted, first, that on the death of Mr. Corbin, intestate, his widow was not entitled to the increase of the negro slaves, born after the date of the deed ; for by part 1, 2, 3 and 4, the negroes and their increase are vested in the trustees ; part 5, to be held with their increase, and part 7, also to these uses, viz. as to the negro slaves, to permit her, part 10, to receive all the profits arising by the negro slaves aforesaid ; which, by reference, includes the negro slaves and their increase, either from their labor, increase or hire ; and their profits by increase, means profits derived from or by means of the labor or hire of the increase. It would be inconsistent to vest the increase in the trustees as a subject of trust, and direct them to hold the increase in trust, and at the same time to make them a part of her separate estate, and to give her power, by part 16, to take and dispose of them at her will and pleasure. Moreover, she and her husband, by

part 19, may sell and dispose under restrictions there mentioned, of the said negro slaves ; which, by reference, are the negroes vested in the trustees—that is to say, both negroes and their increase. And how could it be necessary to give them jointly this power, if as to the increase, they are intended by the deed to be absolutely heirs ? And here the term, said negroes, relates to the last antecedent, in part 18, where the word, increase, and their power to revoke the uses concerning the said negroes and their increase, is expressly mentioned, and immediately afterwards it is added, and they may sell the said negroes.

Secondly : They argued that this marriage settlement was to be considered as a bar to her claim of a distributive share of the estate of F. Corbin, which belonged to him by this deed ; and they cited 1 Fonb. 92. 2 Vern. 58. 4 Viner, 40. 2 Vern. 709. 1 P. W. 324. 3 Atk. 419. 1 Vez. 1. 1 P. W. 324. 2 Bro. Ch. 95, 394, and many other cases.

Thirdly : They argued, that she had under this deed, a provision made for her out of his estate. In part 15, a lot, wharf, and island, are to be to her use after his death, for the term of her life ; and that this made him a purchaser in equity, of all the estate secured to him by the deed of a settlement ; and he has also provided her with £. 120 per ann. to be paid to her for life, in case of her surviving him, in part 22 : and they doubted whether his estate, being a trust estate, was subject to the act of distributions.

*E contra*—She is entitled under this deed to the increase, as a part of her separate estate ; for the negroes and increase are mentioned in parts 1, 3 & 4, where the purposes of the deed and the passing of the property to the trustees, is provided for ; and in part 7, where the trustees are to hold the property ; yet in part 10, the word, increase, is dropped as an antecedent, and made use of as a relative, she is to receive the profits of the negro slaves, by labor, hire or increase. And why is the omission so carefully observed ? Is it not because otherwise, profits by increase, would have meant profits by increase of the negroes and increase ? Whereas the writer meant the increase themselves to go to her ? In part 12, where the trusts of the property, and particularly of the negroes vested in the trustees are stated, the term, increase, is also carefully omitted. They are to hold the negroes in trust, that so much of the said negroes, &c. Why is the term, increase, dropped here ? The answer is, because the increase were appropriated to her by part 10. In part 16, she is to take the direction and management of the negro slaves, and to take the profits arising from the same, by the labor, hire and increase of the negro slaves. Why is the term, increase, here omitted as the antecedent ? And why is she directed to take and

dispose of the profits by increase in such manner as she shall please and think fit? Here the expression is, increase of the negro slaves. If the term, profits by increase, could be construed in page 10, to be some other increase than that of slaves, it is here explained unequivocally what is meant. It cannot be understood otherwise than that she is to dispose at her pleasure of the negro children born after the deed.

In part 12, the trustees, after her death, are to possess and hold the *negro slaves* for the uses, &c.—Why is the word, increase, not here used? It is because by parts 10 and 16, the increase is given to the feme.

In part 13, where power is given to her to dispose by will, the term, increase, is omitted; and it was properly omitted, because as to the increase, she needed no such power, that being already vested in her by part 10.

The doubt which the ingenuity of counsel have thrown upon this question, is produced by referring the words, *profits by increase*, to the words, negroes and increase, mentioned in 1, 3, and 4. It should be remembered, that the last antecedent is in part 10, and immediately precedes the relative words, *profits by increase*. There is no rule better established than this; that *verba relata ad proximum antecedens refucent*. If this rule be applied to the deed in question, which seems to have been drawn with uncommon accuracy, it will dispel all the doubts which have been raised by referring the terms to a remote antecedent: for then, as clearly as can be spoken in our language, she will be entitled to profits by increase of the negroes, and no one inconsistency will be found in the whole deed; and every part of the deed where the word, increase, is used or omitted, will be completely explained and accounted for.

As to the question, whether she is barred of her distributive share of the property he acquired under this deed, it is to be remarked, that contracts in prospect of marriage, are of various kinds: some settle specific property; others, *covenant* to pay money, or settle property or money. With respect to those which settle property specifically, some of them are in bar of the future claims of the wife; and some of them operate as a purchaser her fortune and future acquisitions. Such as operate in bar of her future claims, have that quality, not merely because they are settlements of property in prospect of marriage; nor indeed do they derive any part of this quality from the consideration that they are settlements of property between the husband and wife; but solely and only from the consideration that the parties have agreed they shall be in bar of her future claims. And such agreement must be evidenced either by the express terms of the deed that they shall be in bar, and of what future claims particularly; for nothing will be barred unless included within the

extent of the terms made use of: For instance, dower will ~~not~~ be barred by a marriage settlement, when it accrues by the death of the husband, unless it be mentioned in the deed that the settlement is to be in bar of her dower, or unless that meaning and intent is to be fairly inferred from the terms made use of in the deed. In C. D. 2 vol. Chancery Dower, 3 E. it is laid down from Equity Cases, 152, that a woman shall not be restrained from having her dower, where the husband makes a settlement upon her in consideration of the marriage portion, if it is not expressed to be in bar of dower, and it does not appear to be expressly intended. If a settlement by him of his estate, in consideration of her portion, will not bar her, how much less will she be barred when he settles nothing of his own upon her, and gets by the settlement, half of her estate? 3 Atkins; 8. 2 Vernon, 365, E. Ca. 218, 219, support the principle, that she is not barred of her dower, unless by an agreement clearly expressed, or plainly to be implied from the deed. The same principle applies with equal force, and is equally well supported in regard to her claims upon the personal estate—her distributive share for instance; it is not barred by a settlement unless agreed to be so, and that agreement sufficiently expressed. In 3 Bro. Ch. C: 362, a lease-hold estate was settled previous to marriage upon the wife, in recompence and bar of dower; *and for a provision for the wife*, the husband had no real estate; and the question was, whether this was a bar to the wife's claim of thirds; and L. Chancellor held it was not. Though mentioned to be for a provision for the wife, yet not being expressed to be in bar of her thirds, the necessary agreement to render it a bar, did not appear. 2 Vernon, 725, 1 Atk. 439, 1 Vernon, 15, are to the same effect. Another circumstance very material in the present case, is, that there is no case to shew that a settlement of the wife's estate on her, or of part of her estate on her, has ever been by construction, made to be a bar where there are not express words: 3 P. W. 199. P. Ch. 63. 2 Vern. 58. 1 E. C. A. 70. There is no agreement expressed nor to be implied, from what is expressed in the deed now before us, for the purpose of barring any claim of the wife, whatsoever: There is no such thing hinted at: And if it be a true rule that she cannot be barred of her thirds, unless there be an agreement for the purpose, then we may conclude that she is not barred of her thirds, a moiety of his dying intestate.

Then the next question will be, can he be considered as a purchaser of her fortune and future acquisitions, under this deed? A man by making settlement on his wife, may place himself in a situation to be considered in equity, as a purchaser of her property;—but then in the first place he must make the purchase by a settlement on her, of his property, not her own.

**Secondly:** it must be *agreed* that he shall be considered as a purchaser. Thirdly: there must be such words used as are sufficient to shew it. For support of the first point, he cited 3 P. W. 199. In support of the second, he cited 1 Fonb. 692. Amaler, 682. 4 Viner, 40. P. Ch. 209. 1 Fonb. 310. 2 Vern. 68. 2 C. D. 390; "A husband settles a jointure suitable to the portion of his wife, which consists of choses in action, and the inheritance settled, the husband dies, his executor shall not have those debts or the inheritance, without a special agreement for that purpose, though the husband left not otherwise assets for his debts." And in support of the third point, namely, that such words must be used in the deed as imply the property settled to be for her fortune, he cited 2 Vez. 677. 1 E. C. A. 170, 70, as to say, that he makes it *in consideration of her fortune*, or in lieu thereof. 1 Vernon, 7. 2 Vernon, 68, 501. 1 P. W. 378. 2 P. W. 608. 2 Atk. 448. 3 Atk. 20. There is no such agreement here, either expressed or implied; and therefore he cannot be considered as a purchaser. The settlement is not expressed to be made of his estate, in consideration of her fortune, but for *and in consideration of a marriage*, &c. and for settling land, negroes, &c. *the estate of the said Jane Innis*.

With respect to covenants to pay money: If they be covenants to pay after the death of the husband, and as he leaves her *as much* by will, or to devolve upon her as her share, 'tis a *performance* or satisfaction of the covenant: 3 Atk. 419. 2 Vern. 709. 1 Vezey, 1. 1 Vez. 520. But if the covenant be performable in his lifetime, 'tis a debt; and debts are to be paid first, and the surplus divided—and then she is to be paid, and to divide the surplus also: 1 P. W. 324. 1 Bro. C. Ch. 63. 2 Bro. C. Ch. 394. 2 Bro. C. Ch. 95. Here is no covenant for payment of money in the lifetime of the husband; and the only consideration remaining, is, whether there be any thing given to her in satisfaction of her claims. He has covenanted indeed, after his death, that his executors shall pay her £. 120 per annum, for her life. It will not be pretended that this covenant was to be as a purchase of or in bar of her future claims. It was covenanted for the reasons and considerations expressed as the causes of that deed; and it has never been performed, for it is admitted by the pleadings to be in arrear; and it is hardly denied that he had nothing wherewith to pay it: and for one thing to be in satisfaction of another, it must be of equal value: 2 V. 37, 409. 2 Vern. 478. 2 Bro. C. Ch. 100. 2 Fonb. 326. 4 V. jun. 391. It must be of the same nature: 1 V. 521. 1 P. C. 394. 2 Fonb. 327. And it must be equally certain: 1 V. 521. 2 V. 636. P. Ch. 394. 1 P. W. 408. 2 P. W. 553, 616. 1 V. 126. 2 Atk. 300. 3 P. W. 227. 1 P. W. 410, 14th ed. The lot, wharf and island do not answer this description; her interest therein is

contingent, depending upon his death before her's : It is ~~also~~ for her life only ; whereas her moiety is forever : They are of different motives ; for one is really, and the other personally ; and they are of very different values.—How can property to the value of one hundred pounds, ever be presumed to be in satisfaction of claims to property for ten thousand ? She is entitled to the annuity, because he has neither given nor left her any property equivalent thereto ; and she is entitled to her distributive share, because there is nothing even, setting aside the necessity for an *agreement*, that the settlement should be in bar which he has given of his, in exchange for her claims. She never had any interest in the lot, wharf and island, because she survived the husband.

As to the objection, that the husband's trust estate is not subject to the act of limitations, a trust estate in personalities is as much subject to distribution on the death of the intestate owner, as a legal estate in personalities is : 2 Fonb. 15. 2 Atk. 296, 299. 1 Vernon, 204. 1 P. W. 109. 1 Vez. 237.

The cases cited on the other side, belong to distinct classes. Some of them are cases where the husband has been considered as a purchaser, by making an equivalent settlement. Such are 1 Fonb. 92. 2 Vernon, 58. 4 Viner, 40. Pre. Ch. 209, 63, 312. 3 P. W. 199. These respect his claim of that which was her's, not her claim as in the present case of that which was his ; and are therefore inapplicable. Some are cases of satisfaction, where the question is, whether the wife's share shall be a discharge of that which was *covenanted* ? Such are 2 Vern. 709. 1 P. W. 324. 3 Atk. 419. 1 Vezey, 1. 2 Bro. C. Ch. 95, 394. Here it is contended that she is barred of her share ; not that it is a bar of any covenants he has made ; they are therefore equally inapplicable. Others again are cases of *performance* of covenants for the payment of money to be made after the husband's death, and which are deemed to be performed by a share of equal value coming to the wife, such as Vezey, 520 ; but here they contend that no share comes to her. Every case of purchase of her portion, satisfaction or performance of covenants must be laid aside ; they are arranged 2 C. D. 2 M. 10. 3 D. 2. The cases which can be properly cited are those only which tend to prove that a settlement on the wife is of itself a bar of her claim to a distributive share of her husband's estate : And every case of that class will be found to stand upon this principle—that the wife has agreed to accept of the settlement in bar of her share ; and that such agreement is expressed or sufficiently implied in the deed of settlement.—A settlement alone even of the husband's estate will not bar her. The case in 1 Atkins, 439, is expressed to be in bar ; and the Lord Chancellor relied upon this, which he need not have done, if the settlement of itself was a bar.



The same remarks apply to 2 Vernon, 724—1 Vernon, 15—1 Ves. 55. The Lord Chancellor thought it would be in bar of all she could claim as widow, if the deed had said the settlement was for a jointure. The same principle prevails in cases of dower; she cannot be barred, although there be a settlement, unless expressed to be in bar—2 Vernon, 365—E. C. A. 209—3 Atk. 9—Ress: E. C. 152.

Judge *Lock* seemed to think it was needless to consider whether or not the feme was entitled to the increase of the Negroes; for the deed directs, that at her death she may dispose of half, &c. and the other half or remaining part of the said lands, Negroes, and other the personal estate of the said *Jane Linis*, to the use and behoof of the said *Francis*, &c. part 14; and therefore if she was entitled to the increase, besides the half which she might dispose of by will, &c. that was a part of her personal estate, and belonged under this clause to the husband. He seemed to think also, she was barred of her distributive share by the settlement.

*Hall* Judge, thought that profits by increase of Negroes mentioned in part 10 and part 16, did not mean the young Negroes, born after the making of the deed: And as to her distributive share, he thought that all which either party could claim was fixed unalterably by the deed; and that she was not entitled to claim any more than that had assigned.

The counsel of the plaintiff perceiving the opinion of the court, dismissed his bill and commenced his suit *de novo* in the Circuit Court of the United States.

### *Wilkins vs. M'Kenzie.*

THE case was thus.—M'Kenzie deposited money with Barclay, and applied to him for part of it, who answered, I cannot pay money but will give bills on New-York: M'Kenzie then asked Wilkins if he wanted a bill on New-York, who answered, yes, and I will pay part in money, and will give my note for the residue.—He did this, and M'Kenzie gave an order on Barclay for one thousand dollars; but it was understood between Wilkins and M'Kenzie, that Barclay was to deliver a bill for it on New-York. Barclay delivered the bill accordingly, and it was returned protested, and in the mean time Barclay failed; and the question was, on whom the loss should fall.

Judge *Taylor* decided that M'Kenzie was liable; but at the Court of Conference, having reflected on the subject and looked into the authorities, he changed his opinion, and the other Judges concurring with him, they granted a new trial. They said this was a purchase of the bill by Wilkins, and the delivery of a bill by M'Kenzie for a precedent debt, and being a purchase, M'Kenzie was not concerned in the event. The case relied on was

*Exp. Term Reports*, 106, *Bolton vs. Reichard*. The cases cited for the plaintiff, were 7 T. 64: For the defendant, 12 Mod. 203—Salk. 124—12 Mod. 408. 517—2 L. R. 930—*Andrew's Rep.* 187, 188—2 Salk. 442—3 Salk. 118—12 Mod. 521—6 Mod. 36.

*Martha Whitehead vs. Clinch's heirs and executors.*

THIS was a bill in equity, filed in Halifax court, to which there was a demurrer. Jacob Whitehead, the husband of the complainant, sold a tract of land to Clinch in 1766 and died in 1782. The complainant filed a petition for dower, in the superior court of law in 1786 or 1787.—The petition was heard and the prayer thereof granted in or about 1899. She was put into possession of her dower lands by a sheriff and jury, and has ever since continued in possession: Clinch died while this petition was pending. This bill is brought to compel his heirs and executors to account for the mesne profits from the death of Jacob Whitehead.

Counsel for the defendant. First; without some equitable circumstances, as defendants detaining title deeds, their loss, or where a discovery from the defendant is necessary, courts will not entertain bills to account for mesne profits, but will leave them to their remedy at law; 2 Vern. 519. 3 Atk. 340. 1 Atk. 524. No such equitable circumstances exist in this case, nor are set forth in the bill. Secondly; this being a case which originated before our acts of Assembly had made any alterations in the English common & statute law respecting dower, it must be decided entirely by the English law; therefore, if the defendant is a writ or petition for dower at law, dies, pending the suit, the damages are lost, and judgment will be given for the dower only. 2 Bac. Ab. late edition, 394, *et passim* 392.—And though the cases are very numerous, when the plaintiff or defendant in a suit at law for damages has died before its determination, it has always been conceded that the damages at law were lost, and equity has never given relief. The case from 2 Bro. C. Ch. 620, &c. is entirely different from the present; there the bill was first brought for dower and mesne profits, in a court of equity and not in a court of law. Thirdly; no mesne profits and damages were recoverable at common law in real actions of which dower is one, on the principle that they were necessary to enable the tenant in possession to answer the demands of the lord.—The only law which altered this principle as to writs of dower, is the statute of Martin, 20 H. 3; and that only gives damages or mesne profits where the husband died seized of the land. Co. Litt. 33. 2 L. Ray. 1384, 2 Ba. Ab. Title Dower *passim*. No case can be produced, where the widows whose husbands did

not the seized of the land of which she prayed dower, recovered mesne profits, except when they are reversed for error in that very particular. In 3 Bro. Ch. C. 264, no damages are prayed against a purchaser in the husband's life-time. Bunbury, 57, a bill in every particular like the present, was reversed by the whole court.

Counsel for the plaintiff. As to the remedy, 2. Vernon 519. 3 Atk. 340. 1 Atk. 524, relate to mesne profits in common cases of ejectment, there equity will not interpose unless the case involve on equity which the party cannot make available at law. 1 Fonb. 13. It is nevertheless true that dower and arrears of dower are peculiarly subject of equity jurisdiction, without any allegation of equitable circumstances. 1 Fonb. 147. 2 Vez. jun. 122. Metford, 109. 1. Vez. 262. As to the right, we contend not for a legal one; let it be admitted that damages are gone at law by the death of the deforcor, and with them the legal right. The right in conscience remains, and equity will recognize it, as well as in the former case. Wherever the law is silent and therefore inadequate to the attainment of justice, equity will interpose. 1 Fonb. 20. Why will equity subject the executor of an executor to a *devastavit* committed by the first executor? 3 Atk. 757. *Because* the law is defective in rendering justice to the party. Why will equity subject the representatives of a defendant, deforcor or waster, or decree for the representatives of a dead plaintiff? *Because* law is inadequate. Why give compensation to the widow, for the detention of her dower, although she has not demanded it? 2 Bro. Ch. 632. *Because* it is just, and the law has not provided for it. Why give account for mesne profits when the plaintiff has not entered? *Because* the law will not. 3. Atk. 326. It were endless to cite cases which are the result of this principle. It only remains to ask if she be not in conscience entitled? She is entitled for the same reason, and upon the same grounds, that a plaintiff is in common cases of ejectment; because he has recovered that which belonged to her. The case cited from Bunbury, 57, ought not to be relied upon; it is a short, loose note, carelessly taken, without detailing circumstances or arguments, and is certainly incorrect in some particulars, and therefore there is reason to doubt it in all. It is certainly incorrect in saying the widow cannot have mesne profits but from the time of the demand. 2 Bro. C. Ch. 632. It is also incorrect in saying, that as she has recovered and is in possession, she may recover the mesne profits at law. Damages in dower are accessorial and an appendage of the principal judgment, like damages in debt, and cannot be recovered in a separate action. Co. Litt. 33. No instance can be adduced of a recovery of damages in a separate action: The case then is incorrect in these points; the remaining one is equally so, for

damages or mesne profits are recoverable in equity, though the husband did not die seized. 2 Vern. 403. 2 E. C. Ab. 388. It is monstrous to say to a deforfeor, resist the just claim of the widow as long as you can, and take the profits which belong to her; neither law nor equity will make you refund them. If this be law and equity, it is not very good sense; common sense will say, the profits equally belong to her, from the death of the husband, whether he did not or did die seized, and it is equally a wrong to her to take them from her. Systems of jurisprudence are systems of principles, not of cases, and we should try cases by them: *Qui horet in litera, horet in cortice*. Principle is the magnetic needle which conducts to the discovery of truth. Let me forget the temerity of a nestling, and guided by principle soar upon the wings of the eagle. Why let the deforfeor keep the profits, when the husband did not die seized? Because, say they, these are to answer the demands of the lord. And, I say, when there is no lord, let the poor widow have them:—The deforfeor ought not to return them, to answer demands which cannot be made.

Is it to such artificial reasoning as this that the just claim of the widow is to be sacrificed? We laugh at it when no effects follow; but when we find it is to have the effect it is advanced for, we cannot refrain from harbouring a suspicion, that the law is nothing but legerdemain.

*Curia advisari.*

### *Anonymous.*

EVERY bill on the face of it shews in what country it is drawn, and that is for the purpose of shewing, by what law it is governable. Here the question is, what damages on a protest shall be paid; whether the damages according to the law of the country where drawn, or where endorsed. The damages should be, according to the law of the country where drawn; for the assignee stands exactly in the place of the payee, and is entitled to the same measure of damages he was, and no more. It is not sound to say that a bill may be drawn at sea, and then to argue that the law of the place where made is not to prevail, because at sea there is no law. The answer is, the law of the place which the vessel belongs to shall prevail. Nor is it conclusive to say that every endorsement is a new drawing, as between endorser and endorsee; for then a foreign bill endorsed here would become an inland bill.

Raleigh, June, 1803.

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Circuit Court of the United States,

Raleigh, June Term, 1803.

*Gibson and others vs. Williams, heir of Williams.*

THIS was a *sci. fa.* to subject him to the payment of a debt recovered against the executor of Wm. Williams, his ancestor. He pleaded that he had nothing by devise, and as to what he had by descent, that he had in 1796 mortgaged the lands, descended to certain creditors of his ancestor for eighteen hundred dollars; and had paid bond debts besides, to the value of the lands. It appeared he had in 1801 sold the equity of redemption, and these questions arose as to the value above the debts paid for his ancestor—First; shall he pay interest for the surplus? and it was held by *Marshall* and *Potter*, Judges, that he should not. Secondly; as to the value shall it be estimated, as worth at the death of the ancestor, or at the time of the mortgage, or at the time of sale in 1801?

*Per curiam.* So much of the lands as the money secured by the mortgage was worth, shall be deemed to have been purchased by the heir, by payment of the debts of the ancestor; the surplus of the land shall be estimated as worth at the time of sale in 1801. It must not be valued as worth at the time of descent to the defendant, for the intermediate profits are a recompence for the expences incident to holding the land, such as taxes and the like.

Verdict and judgment accordingly.

*Teasdale,*

vs.

*Jordan, adm'r in right of his wife of Branton.*

THIS cause being called for trial, *Woods* moved to add a plea, and stated that since the defendant pleaded, judgments had been obtained against him to the amount of the assets in his hands.

And by *Marshall*, Chief Justice, to which *Potter*, Justice, assented; it is in the discretion of the court to permit the addition of a plea at any time before the trial; and the court will admit the plea where the justice of the case requires it. And the plea now offered is such an one as justice requires the admission of. It would be a monstrous proposition that when judgments, after plea had taken away all the assets, the executor or administrator should notwithstanding be compelled to answer the debts first pleaded to.

The plea was added.

*Sanders vs. Hamilton.*

THE declaration stated, that Hamilton's agent had sold a Negro for Hamilton to Sanders, who was sued for the increase; in consideration whereof, and that Sanders had promised he would defend the suit; Hamilton promised that if judgment should be obtained against Sanders, he, Hamilton, would make good the damages; that Sanders did defend the suit, and had judgment against him. One question upon the trial was, how the damages should be assessed; whether according to the present value of the Negroes, or of the value when recovered.

*Marshall*, Chief Justice. The jury should assess damages according to the value at the time of recovery; for supposing he is to have the present value, he should bear the loss in case of the death of the Negroes or other loss since the judgment; and besides, the plaintiff's demand arises immediately upon the recovery, and is not to be influenced by after circumstances.

In the progress of this cause it was moved, that the record of the recovery between Streeter and Sanders should be read.

*Per curiam*. It may be read to prove that there was a recovery, and the amount of damages, but not to prove that Streeter had title, because Hamilton was not a party, or privy.

A juror was withdrawn, and the plaintiff's counsel moved for leave to add a count, which the court said was necessary, to arrive at the merits, but would not admit the amendment except upon the condition of paying all the costs to this time. He accepted of these terms and made the amendment.

*Wilkins vs. Murphy, administrator, &c.*

PLEA, the act of limitations; replication, that the *intestate* assumed; and the evidence offered was, that the *administrator* promised within three years. It was objected that such evidence was not that which the replication offered, and therefore should not be received. To this it was answered that an admission of the debt by the administrator, takes the case out of the act; and there is no other way of giving the evidence to the jury, but under a replication such as this. If the replication should state a promise of the administrator, that would be a departure from the declaration, which states a promise of the *intestate*: And you cannot in the declaration join a count founded on the promise of the administrator with that against the *intestate*. Such counts cannot be joined, the judgments upon them being different: the plaintiff's counsel cited 4 T. 347. H. Bl. Re. 108, 110. *E contra* was cited H. Bl. Re. 104.

*Marshall*, Chief Justice. I doubt whether an admission of the debt by the administrator will take the case out of the act of limitations; for the admission presupposes a promise made within three years, and how can this be when the intestate has been dead ten years? If it were true that an admission of the debt did take the case out of the act, and it could not be given in evidence at all unless allowed of upon such a replication, I should think that a strong argument for admitting the evidence. But the premises are not correct; it is not true that a count upon the intestate's promise, and upon that of the administrator to pay the debt of the intestate may not be joined; the contrary is directly proved by the case cited from H. Bl. Re, 104; where the administrator upon an *insimul compulasset* and promise thereon, was held liable *de bonis testatoris*. The other cases cited, which state that he is bound *de bonis propriis*, are where the consideration for the promise arose after the death of the intestate, and in the time of the administrator; here the promise was on a consideration arising in the time of the intestate. The cases are reconcilable.

The verdict founded on the admission of the evidence was set aside, and leave given to the plaintiff's counsel to add a count, the plaintiff paying costs up to this time.

### Newbern, July Term, 1803.

#### *Ward and others vs. Sheppard, widow.*

**THIS** was an action of waste; for waste alledged to be committed in the dower lands of the widow. The plea was, no waste committed.

*Johnston*, Judge.—Actions of waste have been rarely brought in this country. I remember but one in my practice: That was against Holderness, formerly of Roanoke. And then it was decided, that waste in this country is not to be defined by the rules of the English law in all respects; for cutting timber trees for the purpose of clearing the lands, was not waste here, though it was so in England. If lands are leased to a lessor in an uncultivated state, he must of necessity have the power to clear, otherwise the lease would be of no profit or advantage to him. The same is the case of dower lands. It is proved here, or attempted to be proved, that the cleared lands were not enough for her cultivation; and that the trees were cut down in contemplation of making a clearing. What shall be deemed waste, must in a considerable degree be in the discretion of the jury upon evidence. It seems to me the evidence rather proves that the trees were cut down for sale. The jury will consider whe-

ther they were cut down for this purpose or not ; and if they shall be of opinion that this was the design, then they should find her guilty of the waste. If on the contrary the evidence proves they were cut down with a view to clearing the land, they should find her not guilty.

Verdict for the plaintiff as to 40 acres out of 477. Small damages assessed, and motion to arrest judgment.

*The executors of Tomlinson*

VS.

*The executors of Detestatus.*

**T**HIS was an action of the case upon promissory notes, and *plene administravit* was pleaded.

Upon evidence, it appeared the property was sold by order of court, by an auctioneer in the town of Newbern, and for less than its value, but not under any other circumstances of unfairness. It was purchased in by the widow, who was the executrix.

*Johnston*, Judge. The law of England is as stated by the plaintiff's counsel, that an executor or administrator cannot purchase but by paying the full value. The law however is different here ; for here it is sold by order of court, and by a public officer, the sheriff, whose interest and duty it is to take care that it sells for its value : Therefore she may purchase in such case for less than the real value, if she can ; but if not sold by order of court, or not by the sheriff, the proper officer, she, the executrix, shall still answer for the real value.

*Pender vs. Jones.*

**EJECTMENT.** The defendant, under a deed from his father, took possession twenty-five years ago, of lands then included in Pollock's patent, and has continued that possession ever since. Pollock was an infant till September 1790 ; but within three years from that time, he went over part of the lands included in his said patent, but not then in dispute, claiming the whole, and threatening to sue, unless those settled upon the patented lands, would admit his title and purchase from him. The settlers with the defendant, appointed agents to purchase, and did purchase ; and defendant purchased part of the lands he was settled on, and the plaintiff the residue. This was in 1793, and soon afterwards, the plaintiff enclosed a part of the lands in dispute, and kept them enclosed, and used them till just before the commencement of this action.



The plaintiff's counsel contended that he had gained title under his deed and possession.

The defendant's counsel contended, that Pollock's entry upon part of the patented lands, vested the whole in him; and if not, that his claim made known in the neighborhood of the disputed lands, and the admission of his title, avoided the possession and its effects.

*Johnston, Judge.*—An entry to divest an estate claimed by another, must be on the lands claimed by him; and if there be several possessors on patented lands, the entry must be on each parcel possessed.

As to the claim, I will not now undertake to decide how it must be made: that point may be reserved. Continual claim must be made as near the land as the claimant dare go, and that vests the possession for one year and day. Here it is contended, that claim in our act of limitations, is of a different import, and is productive of different effects, in as much as it vests the possession and preserves the title for seven years more. And also it is contended, that all which is meant by it, is a making it known to the possessor, by some notorious act or declaration, that he, the claimant, is the owner of the land settled on. Perhaps it may be so.

The jury found for the plaintiff, and a new trial was moved for. And after argument, the Judge said, there has been seven year's possession in this case, and that too under a deed; and it makes a clear title for the defendant, unless his possession was overturned by the true owner within three years after coming to age, by entry or claim. Now, an entry to have this effect, must be an entry upon the very lands possessed by the defendant. He said nothing of the claim, but ordered a new trial.

*Smith*

vs.

*The heirs, devisees and legatees of Richard Caswell.*

UPON the bill, answers and evidence, the case appeared to be—that the testator by his will, charged his real estate with the payment of his debts, and authorised a sale by his executors, in case it should be necessary.

Smith obtained judgment at law in this court, in September term, 1792, for about seven hundred pounds, with stay of execution for six months. At that time the executor had assets to the amount of eight thousand, or nine thousand dollars. Before the six months were expired, other judgments were obtained. The largest of these, to the amount of five hundred and forty-one pounds, the executors purchased. Under these

executions, part of the property was sold; and in 1796, a sale was made by the sheriff to satisfy the execution of five hundred and forty-one pounds. Before the expiration of the six months, the property was removed into another county, and a sale was attempted afterwards to satisfy the plaintiff's execution; but the executor and one of the heirs, now a defendant, drove away the bidders, and a sale was postponed. After this time, the property could not be found by the sheriff.

The plaintiff's counsel insisted that the bill was a proper one, in aid of the execution; for the lands could not be come at at law, since although they were made assets by the will in the hands of the executor, they could not be sold by a common law execution; neither could they be sold by a *sci. fa.* to be issued upon this judgment; the executor had not pleaded fully administered.

For the defendant it was argued, that the executor was liable to be proceeded against, as for a *devastavit*; and should be resorted to before recourse could be had to the lands. Indeed the heirs cannot be proceeded against at all in equity, because the deficiency of assets was occasioned by the delay of execution which the creditor consented to. It is the loss which took place in consequence of this delay, that has forced the plaintiff to attempt a recovery against the heirs. Part of this property was not sold till 1796. The plaintiff's execution bore test before several others under which it was sold. Secondly: the plaintiff can yet have remedy at law, by an action of debt on the bond against the heirs, if they were liable to the debt under the circumstances of this case. Thirdly: the plaintiff can have remedy at law, by proceeding against the executors or the representatives of the executor, who it is said, is now dead.

Johnston, Judge, decided, that notwithstanding these objections, the bill in equity will lie, and decreed for the complainant. He said, it is sufficient for the plaintiff that his execution was returned—nothing to be found. He need make no further proof. Possibly he might sue the heir upon the bond. He might, perhaps, by proceeding against the representatives of the wasting executor, recover; but he would meet with great difficulties in that way, if not be finally defeated: And why take that course, when there is one more near and plain than the one he has taken. There can be no doubt but that this court has jurisdiction over the cause. The will directs the executors to sell the lands for the payment of debts:—It is a *trust* in them, and this court is properly called on to enforce the execution thereof.

*Clark vs. Arnold.*

**EJECTMENT.** The plaintiff claimed under the Trustees of the University, who claimed the lands as confiscated, having lately belonged to Henry Eustace M'Culloch, who was, and remained an absentee in the time of the war. It became necessary for the plaintiff to prove that these lands had belonged to M'Culloch. The plaintiff proposed to do this by a variety of circumstances, and particularly that the defendant being in possession when the attorney for the university was about to sue, admitted the lands did once belong to M'Culloch, and had been confiscated. This was intended to be relied on as circumstantial proof, that the defendant knew the grant to him had existed. But *Hall*, Judge, refused the testimony; saying, such circumstances, unconnected with possession, were not proper to be received as raising the presumption of a grant. The trial proceeded, and the defendant offered in evidence, a deed signed by the attorney of Henry Eustace M'Culloch, which had been delivered to Hughey, who had conveyed to the defendant in 1784. This deed had been delivered, after the sale by the trustees of the University, to the plaintiff. But the defendant's counsel offered witnesses to prove the usual practice of Henry Eustace M'Culloch to have been, when he contracted for the sale of lands, to receive part of the money, and to deliver a deed to the purchaser, and immediately take it back from him, before registration, and to detain it till the residue of the money should be paid. The plaintiff's counsel objected that such testimony, not applying immediately to this deed, ought not to be received. But the court decided, that such evidence might be given as circumstantial proof of the delivery. The plaintiff's counsel then offered to prove that after the date of the deed from M'Culloch, Hughey acknowledged he had not paid the purchase money, and that he had no title, as circumstantial evidence to shew that in fact no delivery of this deed had ever been made to Hughey. But the court would not receive this evidence, though the confession was made before the deed of Hughey to Arnold, because if received it would affect a third person, Arnold, the purchaser under Hughey. It was insisted for the plaintiff that such delivery, if believed by the jury, was a delivery upon condition; to be effectual should the money afterwards be paid, which not having been done before the confiscation acts in 1779, that the deed had not passed the title from M'Culloch, and consequently that the confiscation acts had found the title in him, and had transferred it to the state. But the court said such a delivery was effectual to pass the title from him. The plaintiff's counsel urged that if the delivery was good, still registration was necessary to complete the title of the purchaser, and that had not taken place in

1779, nor was originally intended to take place till the purchase money should be paid, therefore the title remained in Henry Eustace M'Culloch, and of course was confiscated. The court said that the deed had lately been registered, having been delivered by the attorney of Henry Eustace M'Culloch, who claims the purchase money; and when registered that it had relation back to the time of its first delivery, and passed the title as from that time, and therefore M'Culloch was divested of it before '79. The defendant was in possession in 1779, when the attorney for the trustees conveyed; and the court said, for that reason a conveyance could not be made before the possession was recovered from him; and that though possibly (which he would not determine) the state might have conveyed, because the state is in possession without entry in all cases where an individual would be by entry; yet the trustees of the University, the grantees of the state, were not entitled to the same privileges.

Verdict and judgment for the defendant.

The reporter is bound by his duty to the public to question, at least one part of this decision. An admission made relative to the land in question, by one who afterwards sells to another, is certainly as much evidence against the purchaser as it was against the vender before the sale: Otherwise the person who was entitled to the benefit of such evidence (which might be decisive evidence too) might be wholly deprived of it by an alienation of the owner. What the reporter contends for is too clear to need much illustration. A verdict can be given in evidence against a purchaser.—A recital in a deed of the former owner may.—An answer in chancery may, as a confession, unless in case where the alien himself, or some person claiming under him would make use of it: 4 C. D. Evidence, A 5, ch. 3. 6 Mod. 44. Salk. 286. Pek. Evidence, 26, 34, 35 L. Evidence, 36. And nothing is more common in our practice than to give evidence (with respect to the extent of boundaries,) of what the former owner said, if it operates against him.

But let it be remembered, once for all, that I impute this, as well as every other mistake of Judge Hall, to the hurry of business. I believe the government at this time has no officer who more deserves its confidence: Yet I cannot agree to disseminate wrong legal notions out of respect to the opinion of any one.

Edenton, October Term, 1803.

*State vs. Hamilton.*

**INDICTMENT.** Mr. Hamilton, as the attorney for Mr. Deane of Wilmington, had taken a note from Harvey and

Jones, payable to John Hamilton, attorney, &c. and had endorsed to Deane. It was alledged that this note was payable in *two years*, but that the word *years* had been stricken out, and the word *days* inserted in its stead; and that an action had been commenced in the name of Deane, assignee, against Harvey and Jones, in the county court before the two years expired; that judgment was given against them thereon; that they appealed to this court; that a new declaration had been drawn for debt upon premises, instead of the former, which was debt upon specialty; that this new declaration was sent up by the county court clerk, and docket by the clerk of this court; that the jury were impanelled in this court to try the cause; that Hamilton was offered as a witness, and swore he was not interested. He was indicted for perjury, and the perjury assigned in this *that he was interested*. On the trial, Jones and Harvey were offered as witnesses on behalf of the state, and it was objected that they were incompetent; for if their evidence should cause a conviction, then the defendant would be rendered incompetent to be a witness against them when the civil action should again come on to be tried; for it was yet depending, and after much argument, Judge Johnson was of opinion the objection was a good one, and rejected their testimony. Deane's testimony was then offered for Mr. Hamilton, and rejected for the same reason; namely, because he was interested in proving the innocence of Mr. Hamilton, in order that he might support the action of Mr. Deane against Harvey and Jones.

Verdict not guilty.

## Wilmington, November Term, 1803.

### *Smith and wife vs. Ballard and others.*

AFTER a very elaborate argument in this case, and time taken to consider, Judge *McGay* was of opinion that this being a bill to perpetuate testimony relative to lands of which the complainants were *out of possession*, should be dismissed upon the answer filed to it. The complainants might sue at law, and have the benefit of the teste money immediately notwithstanding; 1 P. W. 117; and notwithstanding there was an affidavit here as to some of the witnesses, that they were aged and infirm and not likely to live long. And he seemed to think there was still less reason here for perpetuating testimony in such a case than in England, for here when an action at law is commenced, the depositions of the witnesses may be taken, but there depositions cannot be taken in a suit at law, and of course as to those who were not able to travel to court, their evidence must still be lost to the plaintiffs; and that possibly might be the reason of 1 P. W. 117.

## Circuit Court of the United States.

Raleigh, December, 1803.

*Murray and Murray vs. Marsh and Marsh.*

**PER curiam.** MARSHALL, Chief Justice, and POTTER, Judges. Loomis and Tillinghast assigned to the plaintiffs the note sued on, which was made by the defendants, and afterwards became bankrupts, and obtained a certificate. And now Loomis is offered as a witness for the plaintiffs. He is a competent witness; for he is by the certificate discharged of all debts provable under the commission, and his endorsement to the plaintiffs rendered him liable to them, so as to make their demand against him. Secondly; the record of the proceedings against them, attested by the clerk of the district court, without any certificate of the presiding Judge, is good evidence; for the act of Congress relates to certificates in case of officers of the several states, not to those of the United States. Thirdly; if the objection to a witness arises from proof made by the objector, the witness cannot discharge himself of the objection, by any matter sworn by himself; it must be removed by proof drawn from some other source. Fourthly; depositions to him not specifying the parties between whom they are taken in the caption, nor naming them as parties in the body of the deposition, cannot be received. Fifthly; if a plaintiff supposing himself ready, presses for trial, and it is found on trial that the testimony he relied on cannot be given in evidence as he expected and he be nonsuited, the allegation of surprize shall not prevail to set aside the nonsuit.

*M<sup>c</sup>Allister and others vs. Barry and others.*

**PER curiam.** Misrepresentationss, and obtaining a bargain in consequence thereof, disadvantageous to the party deceived by them, is a ground in equity for setting aside the conveyance, although the party imposed on were of sound understanding, and had time enough to detect the falshood before he made the contract. In this case the debts due from the testator were represented to his legatees to be very large, and likely to fall upon the estate in remainder devised to them; and it was concealed from them, that a fund was provided by the testator for payment of his debts. The conveyance must be set aside but the grantee shall be allowed for the improvements made on the estate.

*Hamilton vs. Jones and others.*

**THIS** was a *scire facias* against the heirs and devisees of John Jones, deceased, to have execution against the lands descended or delivered to them, of a judgment obtained against the executors upon a plea of fully administered, found for the executors. After the test of the *sci. fa.* but before the issuing of it was known to Peter Arrington, he purchased a share of the lands from one of the defendants, who being served with the *sci. fa.* would not plead thereto. Arrington alledged there were personal assets much more than sufficient to pay the debt.

**Marshall**, Chief Justice. The seller impliedly gave power to the vendee to plead such pleas in his name as were necessary for the defence of the land; and should a plea be now put in by Arrington in the name of the vendor, I would not consent to strike it out.

Whereupon Arrington put in the plea of personal assets in the hands of the executor, enough to satisfy the judgment. And he put in the name of the vendor in open court.

*Hamilton vs. Simms.*

**PER curiam.** This is a debt upon bond, against the heir of the obligor; and if the plea of nothing by descent or devise, be falsified by verdict, the judgment will be *de bonis propriis* of the heir or devisee. And it will not help the defendant if the jury should find the value of the land on such issue, for still the court would give the judgment against the defendant *in jure proprio* for the whole debt. Thereupon this plea was by consent withdrawn, and the lands devolved to the defendant in remainder set forth in a new plea.

*Jones and wife vs. Walker and others.*

**PER curiam.** An appeal from an inferior court of admiralty, takes the cause from that court, and such court can no longer act in it: But it still retains power to take care of the goods seized, which are the subject of the suit; and to that end it may order a sale of such goods as are likely to perish. What raised the greatest doubt with us was the uncertainty whether the goods in question were sold by order of the court. The proceedings shew that after the appeal, the now plaintiff was ordered to pay for salvage, one third in value of the property by a certain day, or otherwise an order of sale should issue. Then it appears that the counsel for the claimant procured a postponement of the sale till the 4th of February. It appears also, by a deposition of the Marshal, that he sold by order of the court. And it appears by other de-

positions that the papers of this court were kept very loosely, on slips of paper, which were often removed from the office, as applied for by individuals. From all these circumstances we have concluded that the evidence is in favor of the order of sale. Then if the court ordered a sale, those who purchased under it should be protected; and the defendants are those persons. It was argued that all the world are parties to a prize cause in the admiralty; and are affected by a decree in the appellate court. This should be understood with some restriction. Upon the publication made of the suit depending, in order that all persons interested may come in and defend, all persons are bound by the decree pronounced upon the point then in controversy. But there is no controversy between the libellants or claimants and those who afterwards became interested by a purchase, under orders and proceedings of the court in the cause between the libellant and claimants. Such intervening persons are not bound by a decree made between the libellants and claimants in the appellate court. The defendants are entitled to retain the property they have purchased, although the decree of the appellate court declared to belong to the claimant.

Newbern, January Term, 1804.

*Gray vs. Edward Harrison.*

**EJECTMENT.** *Taylor, Judge.*—The plaintiff claims under Febin Gilgo, who claimed as heir to William Gilgo, who died in 1781; and upon the sale by Febin, he said he had sold the lands which he heired as brother of the half blood to William Gilgo. This evidence is not admissible, and the jury should not regard it; for a man, after he has sold, cannot say that which renders the sale invalid.

As to the other point, the defendant formerly exhibited a paper purporting to be a deed to himself from Febin Gilgo, and had it proved and admitted to registration; and claimed title under it when the land was about to be sold as his brother's. It is, therefore, now insisted, that *he* cannot, whatever the *plaintiff* may, *deny* that to have been the deed of Febin. That deed, therefore, must be taken to exist, and he is estopped to say Febin had no title. Had he exhibited the deed in this court, on this trial, and claimed title under it, I think he would have been estopped. Estoppals run between parties and privies. Here the plaintiff is not a party to the deed, nor is privy to it.



*Lawender, an infant, by his next friend,*

vs.

*The administrator of Pritchard.*

**T**ROVER for property alledged to have been given by Pritchard, in his lifetime, to the plaintiff. The evidence was, that about a week before his death, and whilst he was in good health, Pritchard came to the house of the plaintiff's father, and said to the child: "*I give you all my corn, and all my hogs, my horse Tucker, and my Negro Shade. Here take of the corn I have given you.*" And gave him an ear or two of corn.

The defendant's counsel insisted, that no gift can be complete, until a recovery of the thing given—and that where an actual delivery does not take place, there must be some act equivalent to it; as giving the key of a trunk, or of a room in which the goods are, or the grand bill of sale of a ship at sea. In all these cases, and in every other that can be produced, the donor retained no possession of any part: here every thing was retained by him.

As to a symbolical delivery, they denied that the law allowed of any such thing in the case of gifts of personal property *inter vivos*. They cited 2 Bl. C. 441. Toiler on Excessions, 181, 182. 2 Vezey, 431. 2 Vezey, jun. 111. 1 P. W. 401, 441. 2 Vezey, 442. 3 Atk. 214. 2 Vezey, 440.

*Taylor, Judge.*—Where the things given are not present to be delivered, a symbolical delivery is allowable by the law of this country. The horse was in the yard, and ought have been delivered; and the gift is clearly not good as to him. The corn, hogs and Negro were not there, but two or three miles off. As to them, the delivery of the ear of corn was a good delivery, if delivered in the name of all.

There was a verdict for the defendant, and a new trial granted.

### *Pitman vs. Casey.*

**T**AYLOR, Judge.—The trespass complained of, first commenced above three years before the institution of this action, and has been continued to the time of the action, which was within three years. The act of limitations is pleaded;—and most clearly that act is a bar to the action; for it must be founded upon the first tortious entry; not upon any continuance of possession afterwards, and within the three years. Before an action of trespass can be maintained for continuing in possession after the first entry, there must be a re-gaining of the possession by the party expelled. Then the law deems the possession

to have been his all along; and of course that the defendant was a violator of it every moment he continued his possession.

Upon this opinion, the plaintiff was non-suited.

*Pender vs. Jones.*

**EJECTMENT.** The defendant was in possession on the first of July, 1784, under a grant and deed of mesne conveyances. The person under whom the plaintiff claims, came of age in the month of September, in the year 1790. He sold to the plaintiff in the month of October, in the year 1793. In the month of April, in the year 1793, he went to the house of one of the many terretenants who had settled upon the different spots included in this large tract of six thousand acres. And it is inferred by the plaintiff's counsel from the evidence, that the defendant, with the other terretenants, appointed an agent to purchase for them, the several spots on which they respectively resided: and that in October, he was at another meeting, where was the defendant;—and there all the terretenants admitted the title of Pollock.

I am of opinion, that if seven years be completed at a period of time, occurring after arrival to full age, when part of the seven years elapsed during infancy, that the party has three years from his arrival to age, to make his entry or claim, and no more. As to the second point made in the argument, the act requires an entry or claim within the prescribed time; but it is urged that such *entry or claim* is dispensed with, if the party in possession admits the title of the claimant: for why enter or claim, to divest or prevent a title, when the possessor admits it to be in his adversary? I am of opinion, that a deliberate avowal on the part of the possessor, of title in the claimant, or a serious assent to the validity of his title, will render an entry or claim unnecessary, and is equivalent in its effects to an entry or claim.

There was a verdict for the defendant; and upon a motion for a rule to shew cause why ~~there~~ should not be a new trial, the counsel for the plaintiff argued as follows:

Certainly the owner out of possession, is not bound to enter within three years from his arrival to age. Instead of six years, suppose only one year or one week elapsed in the time of his infancy—must he enter within three years after, or be barred? If so, infancy, instead of conferring a privilege, will in reality abridge the time of limitation, and require an entry within the space of a week and three years after;—whereas a person of full age, might defer his entry till six years and fifty-one weeks after his full age. Shall he be compelled to enter before the seven years are completed, when part elapses during his infancy, and the residue after his full age? Suppose then, he was of age

one day only before the seven years are completed—must he enter the day after? Then the infant who has neglected his entry, is in a more eligible situation than he who has neglected it for a less time; for if the seven years expire whilst an infant, he has three years longer; but if only six, he has but one year more. He who is most negligent, is most indulged. He who comes of age to-day, when the time elapses to-morrow, shall be deemed consuant of his rights, and capable to put himself in a condition to assert them in twenty-four hours; when he who came of age yesterday, after the seven years expired, shall be deemed not consuant of them, nor capable to possess himself of the means of vindicating them in less time than three years after. If it be said, that on coming of age, he has it in his election to enter within three years, or at any time after, before the expiration of the seven; that is in substance to say, the proviso does not take place in such a case—for if it operates, it must bar, if the entry should not be made in three years: whereas this opinion supposes he may enter after the three years, and before the seven are completed. Then this case is under the enacting clause; and then the opinion amounts only to this—that where part of the time runs during infancy, and other part after, that the bar take place after the expiration of seven years. If therefore, four years run in the time of infancy, he must enter within three years afterwards: not by force of the proviso, but of the enacting clause; and is exactly the same opinion combated by the example of seven years elapsing the day after arrival to full age.

It may be said, *exceptio unius est exclusio ulterius*; and as none are excepted out of the generality of the enacting clause, all are bound except those described in the proviso: infants against whom the seven years have run; not those against whom it did not run in the time of infancy. The letter of the act is so, but the meaning cannot be, for it involves the absurdity before pointed out, of most indulgence to the most dilatory. Then the act contemplates only two cases,—seven years running against a person of full age, and seven years against those under age. The mixed case now before us was not contemplated, and is a *casus omissus*; and if so, it is either not under the operation of the act, and is subject to no limitation; or if subject to its general spirit, that is to be collected by the rule laid down by Lord Coke, by construing the act as near to the rule and reason of the common law as possible. That imputes no laches to infants whatever, as may be seen in a great variety of instances in Lord Coke's chapter of Entries, Descents which toll Entries, and Warranty. This rule, if not imputing negligence to them, is universal with the exception of *estates upon condition*, *plenary* for six months, by an incumbent, and some few others distin-

gushed by the regularity of the reasons on which they are founded. If so, the operation of the act did not commence in the case before us till his arrival to full age. This is proved to be the true construction by another example, which cannot be disputed.—Suppose six years run against an infant, and he then dies under age, leaving an infant heir;—he will have the same time allowed him to enter, as if no time had elapsed in the life of his ancestor. Suppose also, six years run against an ancestor at full age, and he dies, leaving an infant heir; he will be barred if he shall not enter within one year after. And what is the reason of this difference? It is because no laches are imputed to the infant ancestor, and therefore not to be reckoned against him;—whereas, laches are imputed to the ancestor of full age; and therefore the time shall be reckoned on in him and against his heir also. And if the six years shall not be computed against the infant ancestor who dies, why shall it when he lives to arrive at age?—I can see none.

The new trial was not granted, but it seemed to be upon the ground that if the direction was wrong, yet if the jury gave to the jury, still the seven years were considered one year after his arrival to age, and he ought to have entered before that period, and that he was not allowed to seven years after coming of age, nor admitting that there was no exception it would be so; the plaintiff, whether an infant or not, would be barred; and the effect would only be to place a seven years have elapsed during infancy, by the express words of the act.

#### *Dutton vs. ———*

**MR. C.** stated that this was an injunction bill, and that the defendant had been dissolved more than two terms ago, and that the plaintiff had applied for a new injunction time in the cause.

The counsel for the complainant stated, that the papers in relation to the dissolution of the defendant were before Mr. Phipps, who was sitting at the bar, and he had seen them, and the counsel for the defendant had seen them.

The court said that he had not seen or heard of them, and that he could not say whether or not they were before him.

The counsel for the defendant stated that he had applied to the court for a new injunction at the last term. Upon which the court said, that it was a proceeding towards the hearing of the cause, and continued the cause.

#### *Smith vs. Bowen.*

**MR. C.** stated that **MR. TAYLOR**, Judge. The defendant has a right to a new trial, and he deems it important, and which is a matter of course, and it is the answer to be one of the is-

sues to be enquired into, and the court will not refuse it. So an issue which Judge Hall at the term refused, was now referred to the jury; namely, whether the bill of sale made by the plaintiff to the defendant's wife, was intended to comprehend the Negroes in question; and whether the conveyance which Smith made of the Negroes in question, to Rowland, the father of the defendant's wife, was intended for the fraudulent purpose of defeating creditors. The plaintiff alledged it was in trust to return the Negroes to him when called for; and upon this allegation his bill was founded.

*Per curiam*, in his charge to the jury.—It is not enough for the maintenance of this issue, that the parties supposed a certain person would recover against the grantor; and that the conveyance was made to defeat that person; it should appear that he was actually a creditor.

And upon this issue the jury found for the plaintiff, that it was not to defraud creditors, though there was full proof that it was intended to protect the property against the effects of an action, then depending, in which the plaintiff claimed damages for the conversion of certain slaves, in which he finally failed.

### Stowell vs. Guthrie.

**T**ROVER for goods, and notes for money won by gaming. And for the plaintiff it was argued, that though under the British act, and according to the cases which put a construction on it, the plaintiff cannot recover, because in *pari delicto potior est conditio possidentis*; yet that rule will not apply to our act, which goeth further than the British act, in this, that by our act not only the security but the contract is void: And by our act also, the transfer of any personal chattel, to satisfy or pay money or other thing won by gaming, is void. By the British act, the payment of money won is left at the option of the plaintiff; and if he makes it he cannot complain: But by our act, the payment is rendered void. If so, it passes no property to the receiver, and he gains a naked possession only by the transfer, leaving the property in the loser. And why leave the property in him, unless he can recover it? Of what use will it be, to say that the transfer shall be void, if the plaintiff cannot have an action to assert his right of property? The transaction will be void in words, but in reality unavoidable, for want of the means necessary to its avoidance.

*E contra* it was argued, that winning a thing staked up at the time, was not within the prohibition of the act; and if it was, that the plaintiff, who is a violater of the law, shall not be heard to complain of the consequences of his misconduct.

*Taylor, Judge.* The act should be so construed as most effectually to suppress the vice of gaming, which is the parent of every misfortune; and the best way to do this is to give no action to the plaintiff in such a case: For knowing that he will not be relieved, he will take care not to engage in gambling.

Verdict for the defendant.

*Quere.*—Is it not the principle of this act to take care of those who have not prudence enough to take care of themselves? If so, it is against its principle to say, let men take care of themselves.

### *State vs. Crawford.*

**I**NDICTMENT for passing counterfeit money. Amongst other things, evidence was given of his having in his possession five or six years ago, stamps for making impressions to the similitude of dollars and guineas. Having been convicted, a new trial was moved, because one of the jurors was not a *freeholder*, and this not known to the defendant till after the trial.

*Taylor, Judge.* A new trial is in the discretion of the court, who will not grant it unless dissatisfied with the verdict. Here was a full defence and a full examination of the evidence, and it was very sufficient, in my opinion, to warrant a verdict. This is not like the case of a juror who had expressed ill will towards the defendant before being impannelled; for there, though the verdict was not incompatible with the evidence, there might be reason to suspect the trial had not been impartial.

Hillsborough, April Term, 1804.

### *The executors of Alston vs. Jones's heirs.*

**M**'CAT, Judge. No doubt can be entertained but that decisions have been made in this state, which reject the evidence of a man who is offered as a witness to detract from an instrument himself has given. Here, however, the instrument was given by the witness as an attorney, "*Samuel Landrum, as attorney,*" &c. is stated in the deed. He is, therefore, admissible, and is not subject to the rule insisted on.

Halifax, April Term, 1804.

### *Joseph Hill and others vs. Robert Hill and others.*

**T**HIS was a bill to compel the defendants, the executors of Thomas Hill, deceased, to distribute the *residuum* of his estate undisposed of by his will; and also a legacy which had been

lapsed on the death of the legatee in the life time of the testator. The defendants demurred, and insisted in argument that the property sought to be distributed, belonged to them as executors.

*M. Cuy*, Judge, took time to consider of the same after argument, and said, as to the lapsed legacy, that could not go to the executors, because the disposition to the legatee shewed that he did not intend it; for the executors and he relied upon *Fonblanque*, 131; where the disposition of the *residue* to a legatee who dies in the life time of the testator has that operation. He over-ruled the demurrer as to that. As to the undisposed *residuum*, the defendants counsel argued that the idea of the alteration of the old law in this point arose from the words used in the act of 1715, "No executor or administrator shall take or hold himself (according to the value of the appraisement) more of the deceased's estate than amounts to his necessary charges and disbursements, &c. but that all such estate so remaining shall immediately after the expiration of 12 months be equally and indifferently divided and paid to such persons to whom the same is due by this act or the will of the deceased," &c. The object of this act was a special one, to exclude the executor from holding the property for himself, as had been the practice, and charging himself by the *appraisement* to the legatees and next of kin of the intestate. This act directs that he shall not for the future so hold it, but shall divide it. The goods, by the procurement of the executor, were frequently estimated at an undervalue, and the executor was held liable for that value, as the law stood before this act. Indeed, the abuse of appraisements became so intolerable, that not long afterwards, in the year 1723, the legislature, c. 10, openly complain of and abolish them. And they say in the preamble of this latter act, that *such appraisements have been generally much short of the true value of the property*. If the object of 1715 was to prevent executors holding for themselves property thus undervalued, it would be going beyond the act to extend its meaning to any other alteration of the existing law, especially an alteration of so much consequence as that contended for. The makers of this act had not in contemplation the surplus which under the existing law belonged to executors. They have said, "no executor or administrator shall take or hold." They meant to abolish a mischief common to both. Now the *administrator* could never retain to himself the residue undisposed of by the will; he was bound to distribute all. The law then does not comprehend the case of a residue undisposed of by will. Again, the executor or administrator is to deliver over the property to the party entitled to it by the will of the deceased, or by this act. By this act, the next of kin were entitled to the estate of an intestate; but

no one is intestate who makes a will, and where there was a will the executor was entitled, by the existing law, to all that was not disposed of otherwise by the will. Then the direction of the act is to pay all to the legatees where there is a will, or to the next of kin where there is no will. Where there is a will, and not all disposed thereby, the executor cannot deliver over to legatees *that part*, for there is no legatee of that part. Nor are the next of kin entitled by this act; for this act gives to them only the estate of an intestate. This clause relates only to an executor or administrator on one side, and to legatees and next of kin on the other. These latter are entitled to the full value of the property, or rather the property itself, notwithstanding the appraisement. But where there are no legatees, nor any intestacy, the clause is silent.

What we contend for is very greatly confirmed by the ninth and last clause of the act of 1715, c. 49, the act in question. It directs "that if any sum or sums of money shall hereafter remain in the hands of an *administrator*, after the term of seven years shall be expired, and not recovered by any of kin to the deceased, or by any creditor in that time, the same shall be paid to the churchwardens," &c. Why did not this clause direct *executors* to pay over in like manner, when a surplus remains in their hands after payment of legacies? Clearly because *executors* were, by the law in being, entitled to such surplus.

The court over-ruled the demurrer as to the undisposed residue also.

As to the first point, that a lapsed legacy, like a lapsed residue, will not go the executor; that is clearly a mistake: 1 R. C. A. 243. Moseley, 47. 1 Atk. 494. 2 Str. 905. 2 P. W. 489. And see Toller, 275. 3 Bro. C. Ch. 27. 2 Vez. 166. As to the second point, I doubt much of the correctness of the decision, but can offer no other reasons than those contained in the argument of the defendants counsel.

### *Arrington's administrator vs. Coleman.*

WHEN the trial came on, the plaintiff was about to read two depositions of one Philips and his wife, which were essential in the cause, and it was objected that Philips, the witness, was a surety for the costs of the suit; whereupon his testimony was rejected. The plaintiff moved for a new trial, on the ground of surprise; and M'Cay, Judge, rejected his motion without hesitation.

### *State vs. Stallings and others.*

M'CAY, Judge, after argument.—The Attorney General may ask the question concerning a witness for the defendants,



whether he is man of *bad moral character*; he is not confined to the question, whether the witness be a man of veracity, or of veracity when upon oath.

So the question was asked, as to his moral character.

— vs. *Collin Person's executors.*

**T**HIS was an action of debt brought against the defendants, naming them executors, and founded on a judgment in Virginia, against them as executors, *to be levied of the goods of the testator, if there were any such, and if not, then the costs de bonis propriis of the defendants.* To this action the defendant now pleaded, *no assets.*

*Per curiam.* The confession of judgment in Virginia, and the entry in consequence thereof, is a proof of assets, and judgment now shall go against the defendants for the whole, *de bonis propriis.*

*Johnston vs. House.*

**M**'CAY, Judge. Person surveyed the land for the patentee, under whom House claims, and extended the line in question 160 poles, and marked and cornered it, as also the next line: But coming to calculate, he found he had included seven hundred and twelve acres, instead of 640, and he cut off the land in question by drowning from 80 poles instead of 160. But he returned a platt to the office, mentioning the corner red oak, marked at the end of 160 poles, and the corner white oak, marked at the end of the next line drawn from thence. The platt having been returned with these corners, although mentioned to stand at the distance of 80 poles instead of 160, they shall be taken notwithstanding the *distance* mentioned in the platt, to be the true corners. The corner marked at the end of 80 poles, is a white oak, instead of a red oak, called for in the patent.

Verdict for the defendant and a new trial refused.

Wilmington, May Term, 1804.

*Bordeaux vs. Williamson.*

**T**HIS was an action of trespass *quare clausum fregit*, and the defendant pleaded that a common way used by the neighborhood and leading to a *landing* and public *road* ran through the lands of the plaintiff; and that it had been usual to repair it by cutting timber for the purpose near to it: That the trespass

complained of was for cutting needful timber for the repair of this common way, and near to it, &c.

*Locke, Judge.* Ways are of two kinds—those which are established by public authority, and private ones which are by grant or prescription. Proof, as here, that it been used as a way for the neighborhood for near 40 years, when the commencement of the usage is known, will not suffice for the establishment of it, as contended for by the defendant.

Verdict for the plaintiff.

### *London vs. Howard.*

**BARCLAY** made a note payable on demand, the 10th of December, 1801, to Howard; he endorsed immediately to London; Barclay failed the 26th of January, 1802, and had not in that time been applied to by London for payment of this note, though in the interim he had received considerable sums of Barclay on other demands, and had given him credit on other accounts to a considerable amount. Both lived in Wilmington.

The defendant's counsel said that the plaintiff should in a shorter time have made application, and on non payment, should have given notice thereof, and that he looked to the endorser.

*Wright*, for the plaintiff, admitted, that by the rule of the English law he should have made application for payment in a shorter time perhaps, but these rules are not applicable here, nor have been adopted by the decisions of our courts; and he cited *Haywood's Reports*, 3, where Judge *Williams* decided, that the holder shall be allowed a year's time to make demand of payment and to give notice. This proves that a longer time is allowed in this country than in England. A year has been fixed upon as being about the proper time; London obtained judgment on this note about a month after its date, and the execution was returned *nulla bona*. It is the custom in this country that the holder should first sue the maker, and after that and not before, to sue the endorser, the time elapsing during the suit, is not to be reckoned against the holder.

*Casten.* One of two innocent men must sustain a loss.—It should fall on London. He said he would take Barclay's acceptance for the debt due from Howard. On the 26th January, 1802, London got a Judgment confessed by Barclay, and thereupon, he, Barclay, was declared a bankrupt. When Howard endorsed the note it became a bill of exchange, and subject to all the same rules: *Kidd*, 117, 126, 127. Formerly it was the province of the jury to determine in each case on the sufficiency of notice; now it is a question of law to be decided by the court: *Kidd*, 127. There notice should have been given upon the same day: all parties being in Bristol, within twenty minutes walk of each other, the court decided what was reasonable time; the note

was due the 5th, and on that day an application for payment was not made, and *then*, said the court, the bill was dishonored. Haywood's Reports, page 3, is incorrect, and besides it does not say a year is the time, for of that the Judge doubts. Campbell and Craig—there the bonds were not endorsed, and unnegotiable, so not subject to the rules attaching on bills of exchange: What the Judge said there, proves that the British rules are adopted here, in case of negotiable papers. There is the same reason for their obtaining here as in England. Merchants are liable to fail here as suddenly as in England. And shall the holder keep possession and demand payment when he pleases, when in two or three days, perhaps, the maker may become insolvent? No endorser would be safe, no one would under such rules become an endorser. If Howard was absent a part of the time, his clerk was here, and notice to him would have been sufficient; obtaining a judgment will not excuse the holder. London received in the interim different sums of money on other accounts, he held Barclay in credit, and therefore held up his note; had he demanded and given notice to Howard, he would have obtained payment, as London did, for his other demands. Should Howard sustain a loss it will be in consequence of the credit London gave to Barclay. In the interim Howard received monies to a great amount from Barclay.

*Jocelyn* for defendant. Every day this country is becoming more and more commercial. The rules relative to commercial transactions should be defined. The holder should be compelled to use reasonable diligence: Mr. *Wright's* are cases of unnegotiable papers. The assignee in these cases was agent of the owner of the papers. If he did not receive payment he was to return them. As to Haywood's Reports, 3, that is not now the law; the courts are governed by more enlightened policy. The present is a transaction between two merchants, and *that* is a circumstance which ought to distinguish it from transactions amongst *planters*. This note was received as payment for a precedent debt, and is a discharge of the debt; this is a material consideration. Howard received large sums in the interim; had London told Howard he looked to him, Barclay would have been called on by Howard, and would have paid it. If a loss happens, it is by the negligence of London.

*Wright*, for the plaintiff. One or the other will lose the amount of this note; who shall lose it is the question. The case from Kidd is good law in the English courts; not so here. The rule is to be taken from our decisions; what is reasonable time differs in different countries and places. Our circumstances do not require the same celerity, nor is it required by our decisions, to which I presume we are to look for what is reasonable time. If Haywood's Reports, 3, be incorrect as to the effect of the ex-

execution in that case, that does not prove that the other part of the case is not so. The subsequent decisions in the same book confirm this as to what is reasonable time. London is within the rule laid down by our courts; it would be the highest injustice to deprive him of the benefit of them.—He has relied upon them. The case from Kidd has not been in use here; he knew it. When London received money of Barclay, he had a right to apply it to his other demands; why make him apply it to this? Howard's assignment made him safe as to this debt. It was prudent to apply the payment to his other demand. Howard received monies it is said; what then? The witness says Barclay owes to Howard a large sum yet; he could not have received the money due upon this note probably, for he could not obtain payment of the whole of his other demands.

*Locke, Judge.* This is a very unsettled question. What length of time shall be allowed, has been variously decided. No decision has fixed it. A shorter time is required when all live in the same place; where at a distance, more. The rule in this instance should not be the same as if they lived at a greater distance. If the same rigorous rule ought not to be adopted here as in England, Mr. London could not recover. From 10th December to the 26th of January, is too long delay. Barclay paid debts in the mean time; he might have received payment; longer time is allowed here than in England; demands are not so pressing here as in England; there, all possible diligence must be used. In the mean time, however, London did sue the defendant, and used considerable diligence. Perhaps the time allowed by Mr. London to Barclay before the commencement of this action, is not, in general, unusual here. The difference made here is an usage that London acted under, and he should now be allowed the longer time given by it. I will, if doubts are entertained, carry this case to the Court of Conference. Howard sustained no loss for want of the notice, for he could not collect all that Barclay owed him.

The jury did not agree, and a juror was withdrawn.

### *Battle vs. the executors of Yates.*

THIS was a petition brought by one of the next kin of the testator, claiming a proportion of a surplus not bequeathed by the will of the testator. It was argued between the counsel, that the cause should be submitted to the court upon the following statement. That the testator amongst other bequests, made the following: "After my debts are paid, it is my will and desire that my stock of hogs and cattle, my notes and accounts, shall go to Uz. Williams." That the executor paid the debts of the estate out of the undisposed surplus; and that if this ap-

plication of the surplus by the executor was proper; and if he was not bound to pay the debts out of the legacy bequeathed to Us. Williams, that then the petition should be dismissed—otherwise there was to be judgment for the petitioner. After argument,

Lock, Judge, declared his opinion that the application of the surplus by the executor, was proper.

And the petition was dismissed.

*Ashe, administrator, &c. vs. Smith.*

**T**HIS was an action brought by Walker, as the assignee of an unnegotiable paper, made payable to the plaintiff's intestate and signed. There was a verdict for the defendant. And now it was moved in behalf of Ashe, that a rule should be made on Walker, to shew cause why he (Walker) should not pay the costs. And upon argument, and citing several cases adjudged in our courts, and upon time taken to consider, the court adjudged accordingly, and ordered Walker to pay the costs, and execution to issue against him for them.

*Hostler's administrators*

vs.

*Smith, executor of Rowan.*

**T**HE defendant pleaded, that after the expiration of one year, he delivered over the estate to the legatees; and that afterwards, judgments were obtained against the executor; and the property so delivered over, was taken to satisfy them all but five negroes, &c. Demurrer thereto.

*Et per curiam*—Executors cannot be levied on property delivered over to the legatee: He must account for the value, and not re-deliver the property to be sold.

Demurrer allowed.

*The heirs of Moseley vs. the heirs of Moseley:*

**T**WO depositions taken for the plaintiff, were offered at the hearing, and both rejected; one because the deponent would not answer cross interrogatories; the other, because it was drawn by the plaintiff's attorney. The cause was carried to the Court of Conference, and there argued; and the same determination was made by that court after the cause was fully argued before them.

## COURT OF CONFERENCE, Raleigh, June, 1804

*Millison vs. Nicholson.*

**M**ILLISON is the administrator of Howell, who was said to be a lunatic. Howell, in his lifetime, conveyed the negroes in question to his sister, who married Millison after her brother's death; but before his death, had conveyed the negroes by bill of sale, to Nicholson, in which was a clause of warranty.

It was argued for Nicholson, that the wife of Millison, if sole, could not recover, though she were the administratrix of her brother—1 Salk. 295. 3 Mo. 276; and that Millison himself could not; because first, if he recovered as administrator, he was liable as husband, by means of the warranty, to the value of the recovery; and therefore, to avoid circuity of action, his action as administrator in contemplation of law, is extinguished. Secondly; he cannot recover, because the wife being estopped by her deed, he also having adopted her circumstances by the marriage, became equally estopped, in like manner as tenant by the courtesy is estopped by the act of his wife: Poll. 61. Co. Litt. 852. But the court decided that he may recover at law, notwithstanding these objections.

*Johnson and wife vs. Pasteur.*

**D**ETINUE. The wife had whilst sole and under age, given the negro in question to the defendant, and afterwards married. After the marriage, more than three years elapsed before the commencement of this action. If it was necessary to join the wife in this action, the act of limitations had barred the plaintiff's claim; and moreover the action was misconceived. The court now decided upon a view of all the authorities that the wife was properly joined. They also ordered a non-suit to be entered in the case of *Norfleet vs. Harris*, which had also been brought up to this court, because the husband had sued in an action of detinue for her property, without joining the wife.

*Stanley vs. Turner.***EJECTMENT.**

**T**HE question here was, whether a naked possession for seven years in the defendant, unaccompanied with any colorable title, would bar this action of ejectment.

*Counsel for the defendant.*—I have understood from old and very respectable practisers, that in ancient times, and until with-

in this few years, a naked possession for seven years had always been deemed a good title in ejectment, either to bar the plaintiff, if the possession had been against him, or to recover upon, if it had been with him. The second clause in the act of limitations, has a prospective view, and regards cases arising after the act, as well as before. It was not by that clause that a naked possession required an entry to defeat it. After the confirmation of imperfect titles, the next thing considered is a class of cases in which there is no colorable title; and there the entry of him who has title, is required to be made within seven years. If it were intended to make it unnecessary to enter upon a naked possession, the legislature having just before spoken of colorable titles, would have introduced the same idea here. Their omission is a proof that they did not intend it. Let it be admitted that the second clause respected existing or past cases; then as to future ones, this act is to be construed as if the second clause were not in it—And then what becomes of the idea of colorable title that is not spoken of or hinted at in any part of the third or fourth clauses? The third clause is that which requires an entry to be made. It respects the titles of those persons who are out of possession. The one clause is for confirming titles; the other is for defeating them by possession. Will it follow, that because an imperfect title, with seven year's possession, is rendered valid—that therefore an entry need not be made against any other possession than one accompanied with a color of title? This third clause of an act, is word for word; the same as the English statute of James, except that in our's the word *claim* is added to that of entry: the objects of both were the same for *quieting men's estates*. No colour of title is necessary under that act; and if it be under our's, it must be for some very cogent reason to warrant such a difference drawn from the act itself. And as colorable title is not spoken of in the third and fourth clauses of our act, I cannot perceive how it can be inferred from either of the clauses that colour of title is necessary.

SEAWELL, *et contra*.—The reasoning employed in the appendix to Judge Taylor's Reports, is not answered nor obviated by what has just fallen from the gentlemen for the defendant; and in addition to that reasoning, other arguments of considerable weight are to be drawn from the title and preamble of the act. If we ask what were the objects of that act, the title answers, "old titles of lands;" and the body of the act gives preference to that old title which has possession in its favor. The possession therefore introduced by the act, is that which is intended to establish an old title. How could disputes about these old titles exist, concerning which the act was made? No otherwise than by means of opposite claims derived from some source independent of

possession ;—in other words, by means of grants or *mesne conveyances* under them. The truth is, that the old titles spoken of in the title of the act, are those spoken of and settled in the second clause of the act which respected them only ; but if our opponents will insist upon a future operation for the second clause, then we insist by way of argument, that if the second clause has such operation, the possession to be avoided by entry, must be a possession connected with some of these old titles : for why mention them at all, if the purposes of the act had not a connexion with them ?

Another argument may be drawn from the terms of the preamble : It expresses that the act is made for *quieting men's estates*. How ?—By possession. There an estate which needs confirmation, is to be confirmed by possession.—And how could that estate arise at the period of passing this act ? It could not be an estate acquired by possession ; for then there was no need of the act, if before it, an estate could be acquired by possession. It must have been an estate then, acquired by some colorable means. It is very true our third clause is penned like the act of James, except with the difference pointed out ; but in the fourth clause, there is something which has no likeness in the act of James ; but that all possessions held without seeing such claim as aforesaid shall be a perpetual bar against all and all manner of persons whatsoever ; that the “ *expectation of heirs*—*not in a short time leave much land unpossessed, and times so perplexed that no one will know of whom to take or buy lands.* But “ *that all possessions held,*” &c. makes an immediate and wide difference between the two acts. Under the act of James there is no enquiry made respecting the possession of the defendant, but on the contrary it is, whether the *plaintiff* has been possessed within the time required : Bull. N. P. 102. But by these words of our act, he need not enter at all unless an actual possession is held against him. Again, the act supposes that unless possession were allowed to produce the effects intended, the expectation of heirs would leave much land unpossessed, and titles much perplexed. How could this perplexity arise ? Could it arise at the period when the act speaks, but by means of titles for the same lands in different persons. If this was the perplexity to be shunned, and if possession is the mean adopted, then it follows that a title supported by possession was meant to be rendered superior to a title without it. These sentences inserted in our act meant nothing if the legislature intended after they were added, that the act should have the same construction as it would without them ; that is to say, the same construction as was given to the act of James which had them not. It is against the rules of exposition to say they meant nothing. If they meant something, and that different from what the meaning would have been without them, our act really does differ from



the act of James in its spirit and meaning, and it only remains to discover what that is. Let our adversaries, if they can, attribute to them a meaning more genuine than that which we have given. Let them prove, if they can, that the perplexity of *titles* which it was the grand object of this act to prevent, was likely to arise by some other means than by different *titles* for the same lands in different persons; and that possession was intended in cases where no such perplexity of title could arise, as it certainly could not, where there was but one grant, and one set of mesne conveyances one for the same land on side, and nothing but a naked possession on the other.

We understand another idea, as lately broached, and arguments founded on it. The fourth clause is said to be a proviso as well to the second as to the third clause. That therefore *femes covert &c.* are exempted from the operation of the second clause in the same manner as they are from the first, if they enter within the enlarged time allowed to them by the proviso; and therefore it is said the remarks made in the appendix are incorrect, and ought not to be relied upon. What then? If it be a proviso to the second clause, does that prove that a colour of title is not necessary? All that can follow only is, that the author of the appendix was incorrect in this particular. A little reflection however will demonstrate, that the proviso is not an exception to the second clause. The proviso operates as an exception of certain persons who otherwise would be comprehended in the general terms of the act, and it concerns persons who are out of possession, and are to regain it by entry or claim. It necessarily, therefore, is an exception of certain persons, from out of some general clause, requiring their entry by a limited time. The second clause does not require any entry, nor at all respect persons out of possession. It respects those only who are in possession, for the purpose of confirming their titles. Those who are out of possession are not comprehended in the generality of its terms, and consequently cannot be within the proviso added by way of exception to some clause which does comprehend them. Simplify what the second clause says with the proviso added, it will turn out thus: *all persons in possession shall have a good title except femes covert, &c. who are out of possession*; or thus: *all persons in possession shall have a good title, except femes covert, who though in possession like the others contemplated in the clause, shall enter to acquire possession within three years after discoveriture, &c.* But why labor on the other side to prove this position? Still our strong hold remains. It may still be drawn from the expressions of the proviso already noted, that the entry or claim is to be exerted against a possession accompanied with colour of title. Upon this expression chiefly is the idea of colour of title erected. It is in vain to endeavor to point

out little inaccuracies in the appendix, if they do not affect the argument raised on the ground we mention.

*Adjournatur.*

### *Trustees of the University vs. Foy.*

**T**HIS was an ejectment brought for the recovery of lands under the acts for endowing the University of this state. After the passing of the act of 1800, for repealing the said acts, it became a question, whether the action could be sustained, notwithstanding the said repealing acts. The determination of that question, because of its importance and difficulty, was referred to this court. In December Term, 1803, Mr. *Jacobs* and Mr. *Duffy*, for the defendants, stated to the court their reasons in support of the position, that the action could not be supported.—And now at this term, *Haywood*, for the Trustees, delivered his argument against that position. The reasons offered by the defendant's counsel, are not detailed separately, because they are for the most part mentioned in the arguments which answer them.

*Haywood*, for the Trustees.—In 1789, the Legislature, by act of Assembly then passed, granted to the Trustees “all the property that has heretofore, or shall hereafter escheat to the state.” By another act passed in 1794, the Assembly granted to the Trustees the confiscated property then unsold; and by another act passed in 1800, it is enacted, “That from and after the passing of this act, all acts or clauses of acts, which have heretofore granted power to the Trustees of the University of North-Carolina, to seize and possess any escheated or confiscated property, real or personal, shall be and the same is hereby repealed and made void.

“*And be it further enacted*, That all escheated or confiscated property, which the said Trustees, their agents or attorneys have not legally sold by virtue of the said laws, shall from hence revert to the state, and henceforth be considered as the property of the same, as tho’ such laws had never been passed.”

In consequence of these provisions, it is imagined the Trustees have no title to the lands in question, because they are of the description mentioned in the act; and it is a question for the consideration of this court, how far the Trustees have title under the former of these laws, and how far they are divested of that title by the latter.

It is supposed by some, that the public property cannot be disposed of but by grant, because in the 36th section of the constitution, it is directed that all commissions and grants shall run in the name of the state of North-Carolina, and bear test and be signed by the Governor, &c. It does not say all proper-

ty shall be conveyed by grant, and not otherwise : but when conveyed by grant, it prescribes the form ; otherwise it would have been uncertain, who should authenticate the instrument, and the form would have been as different and discordant, as the opinions of successive officers were various, upon the subject of the most convenient and proper form. If the legislature is at liberty to direct the officers of state to issue grants for certain property, surely they are at liberty to grant it themselves in a more solemn way by act of Assembly, which is an instrument subject to more scrutiny and solemnity in its passage, than any other instrument known in our law. It cannot be thought that there is more danger of imposition upon the *General Assembly*, in the disposing of public property by act of Assembly, than there is upon individual *officers* conveying by grant.

In truth, the passing of public property by act of Assembly, hath been practised almost ever since the formation of our constitution, and has never been questioned. Some of our most learned lawyers of former times, who had a principal share in forming the constitution, approved soon afterwards of the mode of passing the public property in this way.

On the 18th of October, 1779, ch. 17, a tract of land was vested by act of Assembly, in Thomas Person, his heirs and assigns ; on the same day, another tract is declared to be and remain to Thomas Burk, his heirs and assigns ; 17th of April, 1780, a tract is vested in William Houston, his heirs and assigns ; another in Hannah Reed. Similar circumstances occur in 1780, ch. 40 ; 1783, ch. 36 ; 1783, ch. 38 & 42 ; 1784, ch. 71 ; 1786, ch. 72 & 82 ; 1787, ch. 33 ; 1789, ch. 56 ; and divers other acts passed since 1789. These several acts, demonstrate an unity of sentiment on this subject ; not only of the profession, and of the Assembly, which has from time to time proceeded in this way ; but of the public, who have never questioned the validity of such conveyances. A more important question is, whether it is true as argued on the other side, that a repeal of the vesting acts, divests the Trustees of all the property acquired under the former laws, which had not been disposed of when the repealing act passed ? And if we consider either the nature of conveyances, or of repealing acts of the legislature ; and if we at the same time admit the untrue position, that the Assembly had power at pleasure, to re-assume the property which they had parted with by their grants ; still we shall be obliged to acknowledge, that they have not divested the Trustees of this property.

It is incontrovertibly true in regard to the conveyances of individuals, that if the title be transferred by deed or other instrument ; and that be afterwards lost, cancelled, or otherwise destroyed ; that the title does not revert to the grantor. Gilbert's Law of Evidence, 107, states precisely, " that if a conveyance be

"made by lease and release, the uses were once executed by the statute, and they do not return back again by cancelling the deed;" and in this proposition he is supported by 1 Mo. 107. Buller's N. P. 267. It is upon this principle that a contract cannot be dissolved, nor property transferred, but by consent of the party, who is entitled to the benefit of it—it cannot be dissolved by the arbitrary act of one party, to the prejudice of the other, and without his consent; nor can it be re-transferred by any act, which is not assented to by the legal owner. Is the legislature released from the operation of this principle? No: It is incorporated into the immutable law of natural justice; and no power upon earth can rightfully overturn it. How comes it then, that a declaration of the nullity of the vesting acts, made several years after the property has completely passed from the legislature, without consent of the Trustees, shall again restore it to the state? Suppose such a declaration as completely to have destroyed those instruments of conveyance, as they had been burned, or cancelled, or expunged from all the public records; still the title has already passed, and some further act was required to re-vest these titles—an act as we shall presently see, far beyond the powers of the legislature to perform. If the most complete destruction of the instruments of conveyance, will not restore the property, can such a consequence be derived from the nature of a repealing act? This question is solved by considering the effect of a repealing act. In common with other acts, it has not any retrospective view, unless given it by express words. I do not deny but that the legislature have power to pass retrospective laws, on subjects liable to their legislation: But such an exercise of power is always the dictate of imperious necessity;—is in itself odious; because it interferes with persons and things who did not expect it, and is therefore not admitted, but when the words of the act unequivocally give it such a meaning: 4 Burr. 2461. 2 Mo. 310. 2 Just. 292. The repealing act then in the case before us, having no retrospective terms, commences its operation precisely at that point of time when it passed.

What then became of all the property which had before that time vested in the Trustees? It was not in the least degree affected by the repealing acts. Our opponents say, however, that the words of the repealing act, resume for the use of the state, all confiscated and escheated lands not then sold, although passed with before, and extends expressly to all former acquisitions—and that the repealing act is really retrospective. For a moment be it so;—then we are to enquire not only what they have done, but also (which is far more material) what they had a right to do. And in order to make a fair experiment of the extent of legislative power, let us see how far the legislature can interfere with

the rights of private property ; how far with the property belonging to corporations ; and then more particularly how far they have a controul over the property of the University of North-Carolina. The intangibility of private property, is to every community, a principle of the highest consideration : the industry of its inhabitants depends upon it, and the necessities and the comforts of life, which are results of industry, are produced by a belief in every citizen, that what his industry procures, will be peculiarly his own. In despotic governments, none labor, because the earnings of labor are not free from invasion ; and idleness and poverty, and the destitution of those things which render life agreeable, predominate.

North-Carolina will find by fatal experience, the oftener her legislature breaks in upon this great principle, the nearer will she approach to the representation of despotism. Every example of innovation which she gives, will lessen the assurance of individuals in its sanctity ; because every new instance gives new strength to the practicability of invasion, exposing to public view the futility of the maxim, which professes to render private property inviolable. Deliberate but one moment on the consequence of this principle, and its vast magnitude will rush upon the senses. We shall be convinced of the reasons, why all wise governments have made it a fundamental maxim of their political institutions ; and why in all free ones, it ought to be the most sacred. Those who argue for this power, can only derive it, either from the inherent rights of sovereignty, or from some clause in the constitution of North-Carolina. If it be a right of sovereignty, it is because *Salus populi est suprema lex* ; and can only be resorted to where the maxim applies—in cases of extremity ; and when an abstinence from the uses of private property, would endanger the public safety. Under such circumstances, it is better that one should suffer than all be ruined. Yet here, the individual who suffers, to serve the public, must be compensated for his loss, because it is just that a loss sustained for the benefit of all, should be borne equally by all.—Thus compensation becomes a duty of the sovereign, without which he cannot rightfully practise the seizure of private property : to say that he will do it without necessity & without compensation, would be called tyranny in an individual sovereign : and how is it the less so where the same thing is done by a collective body ? Certainly there is no difference as to the individual who suffers. Vattel B. 1, C. 20, 244, decides that the right of eminent domain is in certain cases necessary for him who governs, and consequently is a part of the empire or sovereign power ; but when he disposes in a case of necessity of the possession of a community or individual, the alienation will be valid for the same reason ; but justice demands that this community or this individual, be

recompensed out of the public money; and if the treasury is not able, yet all the citizens are obliged to contribute to it; for the expences of the state ought to be supported equally or in a just proportion: It is in this as in the case of throwing of merchandize overboard to save the vessel. The assembly of North Carolina, circumscribed in its capacity by the fundamental law of the Constitution, cannot pretend to greater prerogatives than the parliament of Great-Britain, whose power is thus described by the most learned British authors, 1 Bl. C. 160.—“The power and jurisdiction of parliament, is so transcendant and absolute, that it cannot be confined either for causes or persons within any bounds! It hath sovereign and incontrovertible authority, in making, confirming, enlarging, restraining, abrogating, repealing, reviewing and expounding laws, concerning matters of all possible denominations—ecclesiastical or temporal, civil, military, maritime or criminal: This being the place where that absolute despotic power which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. It can in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power by a figure rather too bold, the omnipotence of parliament.” All powerful however as it is, like the Gods who, are bound by the decrees of fate, it bows down before the sacred image of which I am speaking, and reverences the holy rights of private property. 1 Bl. Com. 139, shews the regard paid to them.—“So great moreover” says he, “is the regard of the law for private property, that it will not authorize the least violation of it: no, not even for the general good of the whole community. If a new road, for instance, were to be made through the ground of a private person, it might perhaps be extremely beneficial for the public, but the law permits no man or set of men, to do this with out consent of the owner of the land. In vain may it be argued, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be judge of this common good, and decide whether it be expedient or not.—Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases, the legislature alone have, and indeed frequently does interfere, and compel the individual to assuiesce.—But how does it interfere and compel? Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification, and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All the legislature does, is to

"oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform." The despotic legislature of Great-Britain cannot intermeddle with the rights of private property, but in cases of urgent necessity, and not without making just compensation.—And shall the assembly of North-Carolina encroach upon those rights, when not required by public necessity, and without making any compensation at all? I would fain know, in a concern of such moment, whence it is that they are less bound to respect the rights of private property than the English parliament? and upon what occasion it was, that the people clothed them with a discretion so fatal to their dearest interests? To speak in commendation of the British constitution, is unpleasant to an American ear, because of the idea which is connected with the absoluteness of its power. What then are we to say, when we hear it asserted, that the assembly of North-Carolina surpass them in power, and can do what they cannot? It may be said that the assembly are the only judges of the existence of the necessity which justifies the assumption of private property for public uses. If this be true, then the pre-requisite of public necessity is no restriction of their power; for in their judgment it may exist, when in the opinion of all others it does not; and thus a wrong committed against the rights of an individual, would be sanctioned by the wrong judgment of the oppressor.—Whatever respects the power of the legislature, must be judged of by those who are to determine of the conformity of its acts, to the powers delegated by the people; and when it is said that public necessity must precede their power to affect the rights of private property, and that they have done so without such necessity. Whether it did exist or not, must be determined by some other persons than themselves, *before the act is done*, either by the intervention of a jury, as in the case of public roads; or by some other known mode recognized by the laws and constitution of this country; and *after it is done*, by the opinion of those judges who are appointed to watch over the constitution, and are sworn to reject all unconstitutional acts:—Then supposing this to be the case of an individual—how does it appear that the public necessity demands that seizure of property which the act in question contemplates? It is not to be found in the public records, nor in the public history of the country;—no verdict establishes it;—nor is it even alledged in the preamble of the act: but above all, not a word of *compensation* is any where mentioned in it. It appears to be a seizure without necessity, without cause, and without compensation, and is not justified by the right of eminent domain belonging to sovereignty, because it has not observed the restriction to which that right is subjected.

Is it then justified by any thing we find in the constitution of this state? And it seems to me that there is no part of the constitution of our state, which allows to the legislature a right to divest the citizen, or any corporation or set of citizens, of the rights of private property. There is a clause in our constitution, particularly applicable to this subject.—Bill of rights, sec. 10, “No freeman ought to be taken, imprisoned, or *disseized* of his freehold, *liberties* or privileges, or outlawed or exiled, or in any manner deprived of his life, *liberty* or property, but by the law of the land.” I will presently proceed to remark upon all the material parts of this section; but before doing so, let us notice the effects of a similar, but much less explicit provision, in the constitution of a sister state. It is contained in the 1st, 8th & 11th articles of the declaration of rights of Pennsylvania, and in the 9th and 46th sections of the constitution of that state. The legislature of Pennsylvania had passed an act to divest certain persons of titles acquired under the existing law, and to place titles in others: and this brought on the question, whether the law was agreeable to the constitution—and if not, what was the consequence of its disagreement therewith. And after defining what is a constitution, the learned Judge who presided, discussed the question now under our consideration. He defined a constitution thus: “It is the form of government delineated by the mighty hand of the people, in which certain fixed principles of fundamental laws are established. The constitution is certain and fixed; It contains the permanent will of the people, and is the supreme law of the land: It is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. What are legislatures? Creatures of the constitution; they owe their existence to the constitution: they derive their power from the constitution: It is their commission; and therefore all their acts must be conformable to it, or else they will be void. The constitution is the work or will of the people themselves, in their original, sovereign and unlimited capacity. Law is the work or will of the legislature in their derivative or subordinate capacity: the one is the work of the Creator, and the other of the creature. The constitution fixes limits to the exercise of the legislative authority, and prescribes the orbit within which it must move. Whatever may be the case in other countries, yet in this there can be no doubt that every act of the legislature, repugnant to the constitution, is absolutely void. The late constitution of Pennsylvania declares the rights of conscience, and that elections be by ballot. Could the legislature annul these articles respecting religion, the rights of conscience, and elections by ballot? Surely no. As to these points, there was no devolution of power. The au-



"charity was purposely withheld and reserved by the people to  
 "themselves. If the legislature had passed an act declaring that  
 "in future there should be no trial by jury, would it have been  
 "obligatory? No.—It would have been void for want of juris-  
 "diction or constitutional extent of power. The right of trial  
 "by jury, is a fundamental law, made sacred by the constitution,  
 "and cannot be legislated away. The constitution of a state is  
 "settled and permanent, not to be acted upon by the temper of  
 "the times, nor to rise and fall with the tide of events. I hold it to  
 "be a clear position, that if a legislative act oppugns a constitu-  
 "tional principle, the former must give way and be rejected on  
 "the score of repugnance. I hold it to be a position equally clear  
 "and sound, that in such a case, it will be the duty of the courts  
 "to adhere to the constitution, and to declare the act null and  
 "void. The judiciary of this country is not a subordinate, but  
 "a co-ordinate branch of the government." He then comes to  
 "the point more immediately the subject of our present consi-  
 "deration. "Those passages," says he, "adverting to the be-  
 "fore mentioned clauses of the constitution of Pennsylvania, de-  
 "clare that the right of acquiring and possessing property, and  
 "having it protected, is one of the natural, inherent and unalien-  
 "able rights of man. Men have a sense of property; property  
 "is necessary to their subsistence, and correspondent to their  
 "natural wants and desires; its security was one of those ob-  
 "jects which induced them to unite in society. No man would  
 "become a member of a community in which he could not en-  
 "joy the fruits of his labor and industry. The preservation of  
 "property then is a primary object of the social compact, and by  
 "the late constitution of Pennsylvania, was made a fundamental  
 "law. Every person ought to contribute his portion for public  
 "purposes and public exigencies; but no one can be called upon  
 "to surrender or sacrifice his whole property, real or personal,  
 "for the good of the whole community, without receiving a re-  
 "compence in value. This would be laying a burden upon one  
 "individual, which ought to be sustained by the society at large.  
 "The English history does not furnish one instance of this  
 "kind: the parliament, with all its boasted omnipotence, never  
 "committed such an outrage upon private property; and if they  
 "had, it would have served only to display the dangerous nature  
 "of unlimited authority: it would have been an exertion of  
 "power and not of right. Such an act would be a monster in le-  
 "gislation, and would shock all mankind. The legislature,  
 "therefore, had no authority to make an act divesting one citi-  
 "zen of his freehold and vesting it in another, without just  
 "compensation. It is inconsistent with the principles of reason,  
 "justice and moral rectitude; it is incompatible with the com-  
 "fort, peace and happiness of mankind; it is contrary to the

‘principles of social alliance in every free government; and  
 ‘lastly, it is contrary to the letter and spirit of the constitution.  
 ‘—In short, it is what every one would think unreasonable and  
 ‘unjust in his own case.

‘The next step in the line of progression is, whether the  
 ‘Legislature had authority to make an act divesting one citizen  
 ‘of his freehold and vesting it in another, even with compensati-  
 ‘on? That the Legislature, in certain emergencies, had autho-  
 ‘rity to exercise this power, has been urged from the nature of  
 ‘the social compact, and from the words of the constitution;  
 ‘which says, that the house of representatives shall have all o-  
 ‘ther powers necessary for the Legislature of a free state  
 ‘or commonwealth; but they shall have no power to add to,  
 ‘alter, abolish or infringe any part of this constitution. The  
 ‘course of reasoning on the part of the defendant, may be com-  
 ‘prised in very few words. The despotic power, as it is aptly  
 ‘called by some writers, of taking private property, when state  
 ‘necessity requires, exists in every government; the existence  
 ‘of such power is necessary; government could not subsist  
 ‘without it; and if this be the case it cannot be lodged any  
 ‘where with so much safety as with the Legislature. The pre-  
 ‘sumption is that they will not call it into exercise except in ur-  
 ‘gent cases, or cases of the first necessity. There is force in  
 ‘this reasoning. It is, however, difficult to form a case, in  
 ‘which the necessity of a state can be of such a nature, as to  
 ‘authorise or excuse the seizing of landed property belonging  
 ‘to one citizen and giving it to another citizen. It is immate-  
 ‘rial to the state in which of its citizens the land is vested; but  
 ‘it is of primary importance, that when vested it should be se-  
 ‘cured, and the proprietor protected in the enjoyment of it.  
 ‘The constitution encircles and renders it an holy thing. The  
 ‘present case is a case of landed property vested by law in one  
 ‘set of citizens, and attempted to be divested for the purpose  
 ‘of vesting the same property in another set of citizens. It can-  
 ‘not be assimilated to the case of personal property taken and  
 ‘used in time of war, or famine, or other extreme necessity; it  
 ‘cannot be assimilated to the temporary possession of land itself;  
 ‘in a pressing public emergency on the spur of the occasion.  
 ‘In the latter case, there is no change of property, no divest-  
 ‘ment of right; the title remains, and the proprietor, though out  
 ‘of possession for a while, is still proprietor and lord of the soil.  
 ‘The possession grew out of the occasion and ceases with it.  
 ‘Then the right of necessity is satisfied and at an end; it does  
 ‘not effect the title, is temporary in its nature, and cannot ex-  
 ‘ist forever. The constitution expressly declares that the right  
 ‘of acquiring possession and of protecting property, is natural,  
 ‘inherent and unalienable. It is a right, not *ex gratia* from the

'Legislature, but *ex debito* from the constitution. It is sacred,  
 'for it is further declared that the Legislature shall have no pow-  
 'er to alter, abolish or intringe any part of the constitution.—  
 'The constitution is the origin and measure of the Legislative  
 'authority. It says to the Legislature, thus far shall you go,  
 'and no farther; not a particle of it shall be shaken, not a peb-  
 'ble shall be removed. Innovations are dangerous; one en-  
 'croachment leads to another; precedent gives birth to prece-  
 'dent; what has been done may be done again: thus radical  
 'principles are generally broken in upon, and the constitution  
 'destroyed. Where is the security? Where is the inviolability of  
 'property, if the Legislature by a positive act, affecting particu-  
 'lar persons only, can take land from one citizen, who acquired  
 'it legally, and vest it in another? The rights of private prop-  
 'erty are regularly protected and governed by general, known  
 'and established laws; and decided upon by general, known  
 'and established tribunals. Laws and tribunals are not made  
 'and created on an instant exigency, or an urgent emergency to  
 'serve a present turn, or the instant of a moment: their opera-  
 'tions and influence are equal and universal.—They press equal-  
 'ly on all. Hence, security and safety, tranquility and peace;  
 'one man is not afraid of another, and no man afraid of the Le-  
 'gislation.

'It is infinitely wiser and safer to risque some possible mis-  
 'chiefs, than to vest in the Legislature so unnecessary, danger-  
 'ous and enormous a power as that which has been exercised  
 'on the present occasion; a power that, according to the full ex-  
 'tent of the argument, is boundless and omnipotent; for the le-  
 'gislation judged of the necessity of the case, and also of the na-  
 'ture and value of the equivalent. Such a case of necessity,  
 'and judging too of the compensation, can never occur in any  
 'nation. Singular indeed, and untoward must be the state of  
 'things that would induce the Legislature, supposing they had  
 'the power to divest one individual of his landed estate, merely  
 'for the purpose of vesting it in another, even upon full indem-  
 'nification, unless that indemnification be ascertained in the  
 'manner I shall mention hereafter.

'But admitting that the Legislature can take the real estate  
 'of A and give it to B on making compensation: the principle  
 'and reasoning upon it go no farther than to shew that the Legis-  
 'lature are the sole and exclusive judges of the necessity of the  
 'case in which this despotic power should be called into action.  
 'It cannot, on the principles of the social alliance or of the consti-  
 'tution, be extended beyond the power of judging upon every ex-  
 'isting case of necessity. The Legislature declares and enacts  
 'that such are the public exigencies or necessities of the state as  
 'authorise them to take the land of A and give it to B. The

'dictates of reason and the eternal principles of justice as well as  
'the sacred principles of the social contract and the constitution,  
'direct, and they accordingly declare and ordain, that A shall  
'receive compensation for the land. But here the Legislature  
'must stop; they have run the full length of their authority and  
'can go no further. They cannot constitutionally determine up-  
'on the amount of the compensation or value of the land; pub-  
'lic exigencies do not require, necessity does not demand, that  
'the Legislature should of themselves, without the participation  
'of the proprietor or intervention of a jury, assess the value of  
'the thing, or ascertain the amount of the compensation to be  
'paid for it.'

Here I will stop, though the Judge continues to make many other remarks of great importance. Let us pause now a little and ruminate on the sentiments here delivered. They are the genuine effusions of a mind devoted to liberty, and ardently anxious to proclaim its true principles to the world. It seeks to recommend them by shewing these principles in their native simplicity; and are they not worthy in the most exalted degree of the admiration of every citizen? Would to God I could exhibit them in their most engaging form! How soon should I succeed in repelling the attempts that are made to cover them in obscurity! How soon would they be enshrined in the temple of our hearts and guarded by the affections of the people from every danger!

*No freeman ought to be deprived of his property but by the verdict of a jury or the law of the land*, is a part of the clause to be remarked on, it immediately respects the private rights of individuals. Other parts of it, I shall presently shew, respects the property of corporations as well as the personal liberty of the citizen. There is no doubt but the convention intended this clause as a restriction upon some of the branches of the government, which might otherwise use the powers prohibited. And what branch of the government was so much to be dreaded as the Legislature? The authority of the Executive is too confined to have given cause for apprehension, and the authority of the Judges is here asserted, as I shall presently prove, not restrained or diminished. The things here prohibited cannot be done but in courts of justice regularly constituted, and proceeding according to the known and steady modes of trial, used and practiced in all cases. I have heard it argued, that as the Legislature can make the law of the land by passing an act for that purpose, that therefore this clause of the bill of rights, if taken as restrictive of their power, is of little or no effect. And can there be a stronger argument to prove that the term *law of the land*, has some other meaning? Would the Convention, that wise body of men, who were perfecting the most important instrument that

ever came under the consideration of a deliberative body, have intended to restrain the future Legislature in matters of the most momentous concern, by a provision which they might render nugatory at pleasure? Is it in any way consistent with the dignity of that body or that noble love of liberty which characterised them, to attribute such language as this? These are powers too dangerous to be entrusted with the Legislature, and they shall not exercise them, but if they pass an act for the purpose, they may exercise them? The words *law of the land*, therefore, mean something other than an act of the Legislature. If we resort for its meaning to the history of the times in which it was at first used in national instruments, we shall discover its genuine signification. It was first used in the 29th article of the magna charta of England, extorted by force from the King, and explicitly declaring the rights of the people in instances in which he had formerly violated them. It declared not that these rights could not be forfeited at all, but that they could not be forfeited at the will and pleasure of the executive, nor in other manner than by a fair trial in a court of justice by jury, where the facts were disputed, or where the facts were not disputed by such other modes as were agreeable to the law of the land, or recognized by it. In either of which cases, the judgment of the regular tribunals of the country must be pronounced before the party could lose his rights. This was what was then and is now meant by the term *law of the land*. Sir Edward Coke, in his 2d Institute, page 50, expounds this sentence to mean *due process of law*. In Shower's Parliament Cases, and Hargrave's preface to C. Littleton, it is expounded to refer to such cases as are not triable by the judgment of one's peers: And Sullivan, page 491 and page 493, explains it to mean modes of proceeding to judgment in a court of justice legally constituted; which modes are prescribed by law, and take place in cases where the trial by jury cannot be used; for instance, if the party plead guilty, or will not appear, or suffer judgment by default, or if there be a demurrer upon the pleadings of the parties where all matters of fact are truly stated and admitted by both parties, or where the court passes judgment for a contempt committed in the face of the court. In page 515, Mr. Sullivan says, no freeholder shall be disseized of his freehold but by the verdict of a jury or the *law of the land, as upon default, not pleading, or being outlawed*. The meaning then of the term we are considering, was, that a man should not be deprived of his freehold, &c. but by the judgment of a court of justice, regularly constituted and authorised to decide what the law is, and to pronounce it in cases coming before them: which court shall ascertain facts by the verdict of a jury, where proper; or where that would be improper, by such other means as the law has appointed. How different is this from the

idea which makes every act of the Legislature a law of the land, and vests in them the arbitrary and despotic power of prostrating all those rights so dear to mankind whenever they please ! The term, law of the land, had a precise legal meaning when used by the Convention, and signified the lawful proceedings of the *proper tribunals* of the country. How much more for the advantage of the citizen is it that this should be the meaning of the constitution than the other before adverted to ? If a court of justice injures an individual from unjustifiable motives, the Judge who injures him may be impeached and removed from office ; or he may carry his case before a superior tribunal ; but who shall procure him redress against the Legislature ? The experience of ages evinces this truth, that the judiciary generally acts with coolness and reason ; but it is known to all persons of political experience, that the best and most enlightened men, when placed in large assemblies, will so far partake of the heats of the moment as frequently to concur in measures which in their calm and retired moments they find much cause to regret. Had the Assembly the powers which are expressly denied them by this clause of the Constitution ; there is reason to fear that many would be the victims of the indiscreet exercise of them ; whose property would be safe, or whose life, if an Assembly infuriated by the opposition of party, as in the times of Cæsar and Pompey, or inflamed by artful accusations, or otherwise roused to act against individuals obnoxious to the public, could deprive them of, either without further ceremony than that of passing an act for the purpose, and without more responsibility than to the tribunal of their own consciences. Such times of trouble may come upon us as they have come upon other nations, and it is the interest as well as duty of every good man to shut up as far as possible every avenue to cruelty, injustice and persecution, for we know not upon whom the evil is to fall. In such a state of things, with no bridle upon the malignant passions, how often should we see the mask of patriotism assumed as the prelude to sacrifice ! how often should we see our best citizens sinking under the weight of unprincipled persecution ! Who is there in the least acquainted with the excesses into which numerous bodies are apt to run, that would be willing to see the dangerous power I am contending against, vested in the Legislature ?— May I never see it yielded to them ; for then will my country be covered with the mantle of mourning, and the spirit of confiscation, like that which appeared to Brutus, will follow on the footsteps of her patriots ! Thank God, no man in North-Carolina can be deprived of his life or property but by the regular judgment of a lawful court, who cannot oppress because they cannot originate any law of themselves, but act upon those made by others. It is sometimes argued that the Constitution did not

mean to hinder the Legislature, but all other persons and bodies of men from meddling with the individual rights specified in this 10th article, but that unlimited powers may be safely intrusted with the Legislature. Answer. The Convention clearly thought otherwise; for the 24th section of the Bill of Rights prohibits the passing of any *ex post facto* law, and why? doubtless from an apprehension, that it not prohibited to exercise such a power, it would be used to the injury of individuals. It was equally necessary & essential to liberty, that the property of individuals and their personal liberty should be guarded against the encroachments of the Legislature. This 10th section furnishes that guard, or it is not furnished at all; and this is a consideration which gives additional strength to the argument that this 10th section acts as a limitation upon the powers of the Legislature. As to private property therefore I may venture to affirm it is beyond the reach of the Assembly, and cannot be taken from the owner by any act they can pass for the purpose.

Neither can they take away the property of a corporation. It is remarkable that in the 10th section of the Bill of Rights, the word *liberty* twice occurs, once in the plural and again in the singular; *no freeman ought to be disseized of his liberties, &c. or deprived of his liberty but by the verdict of a jury or the law of the land.* A *disseisin* of liberties has a legal and technical meaning, well known to lawyers to be altogether distinct from the deprivation of personal freedom or the power of going whither we please; it regards property and its possessor, while the other phrase, *deprived of his liberty*, regards his freedom from unjust confinement; *disseisin* of liberties, must in the opinion of the convention, mean something different from *deprivation of liberty*, otherwise it would not have been used in the same clause; it is a term which peculiarly signifies those privileges and *possessions* which corporations have by virtue and in consequence of the instruments which incorporate them. It is defined in 2 Bl. Com. 37, and Sullivan, page 516; commentary upon the word *liberties* used in the 29th article of the Magna Charta, from whence it has been translated into our Bill of Rights, says "it signifies the privileges which some of the subjects, whether single persons or bodies corporate, have above others by the lawful grant of the King, as the chattels of felons or outlaws, and the lands and privileges of corporations." It means therefore, in our Constitution, the *possessions and privileges* of corporations, and in conjunction with the other words of that article, amount to this, that the possessions of a corporation, like those of an individual, shall not be taken away but by the verdict of a jury or the judgment of a court of justice. If then the Trustees of the University be considered in the light of individuals, or of a common corporation, the property which they had

acquired could not be affected by any act of the Legislature; nor could it be taken from them, but by the judgment of some proper court, having sufficient jurisdiction, and proceeding according to the known and established law of the land.

And if so, I would ask, is the University distinguished to its disadvantage from other corporations? Or is there any circumstance which renders its property less sacred than that of an individual or common corporation? It is certainly a correct idea, that where the Assembly are directed by the people in their constitution, to do any special act, and they do it accordingly, the Assembly are to be considered, in relation to that act, as the attorneys of the people, appointed to do it, and consequently, that the act itself is to be considered as the *act of the people*: In like manner as a deed executed by my attorney in my name, is my act and deed, and *not his*. Thus if a Judge or Attorney General is to be appointed, the Legislature, as the attorneys or agents of the people, elect him; but when he is elected, he is the officer of the people, not of the Assembly, and cannot be turned out of office by them. How is the case of the University different in principle from the case here put? The 40th section of the Constitution, directs that "A school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, to be paid by the public, as may enable them to instruct at low prices; and all useful learning shall be promoted in one or more Universities." Now, when the Legislature have, pursuant to this direction, erected and established an University, have they any more power over it than they have over the Judges? Is it not as much the work of the people as if they had established it themselves by the Constitution, without the agency or intervention of the Assembly? Surely it stands upon the same basis as the Legislature itself does. It is as much the will of the people, that there should be an University, and that it should continue, as it is that there should be a Legislature. When the Legislature endowed it, they did so as the organs of the people, and they cannot avoid the gift, before they have received an authority from the people, as express for its dissolution as they had for its establishment. It may be said, the Assembly are directed to establish schools, and one or more Universities, but not to endow them; and that therefore they alone and not the people have given the escheated and confiscated lands to the University. I answer, whenever a principal thing is directed to be done, all the necessary means of doing it are given to the agent. An University cannot be established without funds, and therefore it is necessarily implied they are to provide funds for it, as well as pass a law for bringing it into existence. When the Assembly accordingly pointed out the escheated and confiscated



property, for this purpose, it from that moment became a gift of the people, ratified through the medium of, their organ, the Legislature; which none but the people, assembled in convention, can resume. It has been said, this is a public institution, for public purposes, and therefore is subject to the power of the Legislature, which is intrusted with the superintendence of all other public concerns within this state:

I answer, the *University*, like the *seat of government*, is instituted for public purposes; but like that, is ordained by the constitution for this very reason, that it may not be subject to the vicissitudes of legislative opinion. The legislature may regulate all things which pertain to the seat of government, but they cannot abolish it. They may say the lot on which the state-house stands, shall not be used as a burial ground, as they did on the death of one of their speakers some years ago—or that the front of the state-house shall be decorated with a liberty poll and colors, as they did last year; but they cannot say that shall not be the seat of government. So it is with respect to the *University*: they cannot abolish it, nor do any act which has a direct tendency to that end, such as taking away their funds. All that I need insist upon, however, is this: that they cannot abolish the *University* itself—a position which none will deny. Then it is on the same footing as other corporations, and the 10th article of the bill of rights secures all its property under the words,—no freeman shall be *disseized of his liberties, &c.* but by the law of the land. To avoid this consequence, it must be assumed, not only that the *University* is under the government of the Assembly, but also that its *existence* is dependant on their pleasure; for if like other corporations, its *existence* is independent of the Legislature, then so is its property, for that is secured by the same words which secures the property of other corporations. If the idea were correct, that they who can create can destroy, it would answer no purpose to the advocates for the power of the assembly, unless they could also shew that the *University* is a creature of the assembly. It is a creature of the people, who have used the assembly as an *agent* to effectuate their will; which having been done, their authority upon this subject has ceased forever. The convention intended the *University* should be a *permanent* institution; and therefore they have not left it to the discretion of the legislature, but as a matter of the utmost moment, they have inserted in the constitution, and directed its creation, to the end that being a *constitutional* and not a *legislative establishment*, it should not be liable to those changes, which time produces in the conduct of the legislatures.

To say the least, the *University* is a corporation, as independent as other corporations are, and of course entitled to be as secure against the encroachments of the legislature upon its pro-

erty and effects. But considering it as established by the people, and rendered sacred by a place in our constitution, for the very purpose of perpetuation, it seems impossible to doubt upon the subject before us, or to run the risk of mistake, in pronouncing, that the assembly have no right to interfere with its property of any kind. It is not true that whoever can create, can destroy. In England the king can create, and usually does create corporations; but he cannot destroy them at pleasure. My lord Coke, in his 11th Report, page 99, gives us the reason.—No freeman, says he, of a corporation can be removed, but upon conviction by course of law; for, he adds, it is provided by Magna Charta, ch. 29, that no one shall be disseized of his liberties, but by the judgment of the peers or the law of the land; and 4 Report, 57, proves that the king who created, can no otherwise proceed to the dissolution of a corporation; than by a due course of law, and by obtaining a regular judgment for that purpose. The same doctrine is held—1 Bl. Com. 483. Then it does not follow that because the legislature could create, therefore it could destroy the University and take away its property. But it does follow that if the words used in Magna Charta, as restrictive of the power of the executive, are used also in our bill of rights as restrictive of the power of the legislature, that they must confine the legislature here in the same manner as they do the executive in England: and consequently that the legislature cannot interfere with the University, otherwise than by submitting to the judiciary of the country, whether or not they have been guilty of any such acts as will in law amount to a forfeiture of their property, or to a dissolution of the body, constituted for the superintendence of its affairs. Upon this view of the case, I submit to the court, that the law in question is against the constitution and void.

*Adjournatur.*

### *Cunnison & Co. vs. Hunter.*

*PER curiam.*—If there be a demurrer to one plea, and issue upon another, the parties must be prepared for trial on the issue, though the demurrer be under the direction of the court. Upon an argument formerly had, and the plaintiff being not ready, was non-suited.

### *Hamilton & Co. vs. Simms.*

*PER curiam.*—The defendant to be liable as heir, must have lands which descended to him from his ancestor, and to which that ancestor had title. A deed shewn by the plaintiff from the ancestor to the defendant, is a proof that the defendant had the lands from his ancestor, though it does not appear who caused

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the deed to be registered, or that it was even delivered to or accepted by the defendant.

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— vs. *Heritage*.

**H**ERITAGE had sold lands to the plaintiff, and covenanted for the goodness of the title. He had in his deed, described the lands by a line of a certain course and distance to A B's line—thence a certain course and distance *with his line* to, &c. The course and distance of these two lines included land which belonged to another, but not if A B's line be considered as the boundary.

*McCoy*, Judge. The line of A B is to be considered as the boundary of the land sold by Heritage. He did not sell any beyond that, and of course did not sell to the plaintiff the land he says he did. If that land has been recovered from the plaintiff, this covenant does not subject the defendant to pay for the value of it.

Verdict and judgment accordingly.

Edenton, October Term, 1804.

*Anonymous.*

**D**EBT upon a bond, and *non est factum* pleaded. The plaintiff proved the delivery of the bond, and was proceeding to state the conditions on which it was delivered, to be delivered over.

Mr. *Drew* insisted, that as there was no plea of *delivered as an escrow*, no such proof could be offered; and relied upon the case decided by Judge Taylor at Newbern, and afterwards by the Court of Conference; the case of *Smallwood vs. Clark*.

*Hall*, Judge, said he had long doubted exceedingly of that decision; but as it had been decided by the Court of Conference, he would not undertake to over-rule it—but if a proper case was made, would carry it to the Court of Conference for their re-consideration. Most clearly, if the delivery was made to the plaintiff by the intervening person to whom it was delivered for the plaintiff's benefit, before the terms were complied with in which the delivery to him was authorized by the defendant, it was done without authority, and could not be considered as his delivery, and so not his bond.

*Troughton's administrator vs. Johnston.*

**HALL, Judge.**—The negro sued for, belonged to Troughton, and was pledged to Johnston as security for a sum of money due from the former to the latter: four years intervened, and the negro was exposed to public auction by direction of Troughton, and bid off by Johnston. It is now said, the purchase by Johnston was a mere pretence, and by agreement between him and Troughton; the real object having been to sell to Kirk, a buyer of negroes, by running him up to a high price, and by bidding off for Troughton, if Kirk would not bid as high as the sum contemplated. Such agreement is fraudulent, and Troughton, a party to that fraud, cannot alledge for the purpose of avoiding the sale. But if the jury think a new agreement was made afterwards, which re-vested the property in Troughton, then the sale has lost its effect.

See *Smith vs. Brown, ante.*

*Belch vs. Holloman.*

**DETINUE** for the recovery of a negro slave, sold by Sherrod, a constable, to satisfy executions against the estate of Cobb, to whom the plaintiff's wife was an executor, and also a legatee. She had not made a division according to the will, although two years and more were expired. And now the defendant's counsel insisted, that if the property had vested in her by her electing to take as legatee, which he did not admit, still there was a verdict and judgment against Sherrod, for seizing and selling this negro, rendered at a former term for the sum of thirty pounds and costs.

**Hall, Judge.**—The jury are to judge from circumstances, whether the thirty pounds were given for the trespass only, or for that and the property. If for the former only, the plaintiff is not barred; if for the latter, he is. And he left to the jury the circumstances from which it might be inferred to have been for the trespass only.

They found for the plaintiff, and there was judgment accordingly.

*Hall, assignee, vs. Bynum.*

**DEBT** on a bond. John Short was the attesting witness, and James Short the obligee: He assigned to John Short, and he again to the plaintiff. The hand-writing of John Short was proven, and also that of the obligor. And *Brown* objected to its being read to the jury. And after argument,

*Hall*, Judge, gave his opinion. The case is somewhat like that in 1 Strange, 34, where the obligor left the subscribing witness his executor; but not at all like the case where the witness dies, or cannot be found, or becomes blind, *non compos*, or infamous; for these disqualifications are not brought about by the agency of the obligee. Here it is; and by such means, a forged bond may be easily established against any one, without swearing to a falsity.

The subscribing witness writes the name of the obligor, and the payee or obligee assigns to him; and then some person who is acquainted with the hand-writing of the subscribing witness, swears to it. Proof of the hand-writing of the obligor, is liable to a similar objection: for if the proof of his hand-writing will do, then by a like assignment to the witness, something like that he knew for the advantage of the obligor, would be kept back.

Some days afterwards, the cause was again considered on a motion for a new trial.

The plaintiff's counsel said he would not insist upon the first point; that the witness could be sworn, or his hand-writing proved: but as to the second, namely, that the hand-writing of the obligor might be proved, he could not abandon that without the utmost reluctance. The reason given for rejecting such proof, was, that as the witness could not be sworn, the obligor might lose something within the knowledge of the witness, very material for his defence. Who is it that causes the rejection of the witness? The obligor. Shall he be permitted to say the witness shall not be sworn, and then to say, if he were allowed to be sworn, he would say something in my favor—and as he cannot be sworn, his hand-writing shall not be proved? Again; proof of the hand-writing of the obligor, in cases where there is no subscribing witness, establishes the execution of the bond by the defendant; and the obligee's possession of it, is *prima facie* evidence of the delivery. What then could the subscribing witness prove if he were sworn? He could not say, delivered as an escrow to the obligee, for there cannot be delivery as an escrow to the obligee—nor can he prove a condition, for you cannot aver by parol, a condition against the bond. If it were delivered as an escrow to a third person, there is no need of the witness, for the third person can prove it; nor can the witness prove usury, gaming, or the like—for by his attestation, he has undertaken to support the instrument. There never was a witness called upon to subscribe for the purpose of destroying the instrument by his evidence.

*E contra*, BROWN argued that the subscribing witness would be allowed to prove, delivered as an escrow; usury and gaming; which evidence was excluded by his rejection.

The court took time to consider, and after several days, the Judge said his opinion was not altered by the arguments he had

heard; that he adhered to the rejection of the proof of the hand-writing of the obligor, as well as proof of the hand-writing of the witness.

*Eelbank's executors vs. Burt.*

**D**ETINUE for Negroes. Mr. Davis was offered as a witness to prove some conversation had with Mrs. Eelbank, who, it is alledged, made a gift of the Negroes to Mrs. Burt, on her marriage. But it having been previously sworn that she had admitted a gift on the morning preceding the marriage, when Mrs. Burt was present, the Judge tho't it improper that any after conversation of her's should be received to invalidate the gift. So he was rejected. But had not such admission been proved, and the defendant's reliance had been on the circumstance of the Negroes' going home with his wife, and continuing there for some time, he would have received evidence of conversations about the time of their going home, in order to have discovered what were the intentions of the mother.

*Pennington & wife vs. Hayes, administrator, &c.*

**T**HE plaintiffs had obtained a decree in a county court in Virginia, on the Chancery side, to be levied *de bonis testatoris si, et si non de bonis propriis*. And now *Plummer* objected that this action, which was an action of debt, suggesting a *devastavit*, should have been against Hayes as administrator.—Secondly; that as a *devastavit* was suggested, it should be proved to the jury. Thirdly: that this decree being in Chancery *in rem*, would not support such an action; the object of which is to subject the proper goods of the administrator. He now abandoned the two first objections, but insisted upon the third; and argued, that as the decree was to be satisfied out of assets in the hands of the executor, that it could not be claimed out of his own estate.

*E contra*, it was argued by the plaintiff's counsel, that the proper decree of a Court of Chancery, not made a Court of Record, is, that the executor, personally, shall pay the debt, and process of contempt issues against him for disobedience: 1 Bro. Ch. C. 488. And in that view of the case, it can be no hardship to proceed upon the decree to subject him personally. If, however, the decree be *in rem*, as it is insisted, it must be because the decrees in Virginia can do what decrees in England cannot; for there the maxim is, Chancery *agit in personam*. Their decrees are in pursuance, and their process to enforce them also. It is not, however, for the advantage of the defendant, to say the de-

*decree is in rem*, for so is the judgment at law against an executor, *to wit*: to be levied *de bonis testatoris*; and is enforced by a *fieri facias*, which is a process *in rem*. There is not any reason why the non-production of assets shall not be attended with the same consequences in chancery as at law—namely, being subjected *de bonis propriis*. The judgment at law is a proof of assets and of a *devastavit*, if *nulla bona* be returned—because at law, a judgment would not be pronounced to be levied *de bonis testatoris*, unless it had been previously ascertained that he had assets;—so neither would a decree in Equity, for there an account of assets is always taken, unless the defendant admits them. The court will not pronounce a decree, unless there be a report of assets.—Can there be any reason then, that he shall not be liable personally, in equity, for the non-production of assets, when that non-production will make him liable at law? Or that the words, to be levied *de bonis testatoris*, with a return of *nulla bona*, shall at law be proof undeniable of a *devastavit*; but in equity shall afford no such evidence, nor be attended with any such consequences? Let me ask, how then is the plaintiff in equity, who has such a decree, to proceed upon the return of *nulla bona*? If he cannot subject him *de bonis propriis*, and cannot proceed *in personam*, as is objected, how then can he proceed? He must still look for the fund which no where exists; and if he cannot find that, he must stop. This is the plain consequence of the objection. It cannot be objected that an action of debt will not lie, for the decree in chancery in Virginia, is a matter of record as much as a judgment at law, is equally conclusive, and equally extinguishes the cause of action on which the decree is rendered. This point was decided by Judge Marshall at the last term of the Circuit Court at Raleigh, in the case of *Miller vs. Hardiman*. The only reason why in England debt will not lie on a decree, is, because not being of record, it cannot extinguish, but only ascertain the demand on which the decree is rendered. The defendant is not estopped as at law: in other words, the judgment not being *in rem*, nor enforced by *fi. fa.* but in *personam* only, there must be a new proceeding before the *res* or property of the defendant can be affected; which new proceeding is grounded upon the original cause of action.

The court took time to consider, and then gave judgment for the plaintiff.

### *Huson's administrators vs. Pitman.*

THIS bill in equity stated that Huson was a purchaser, for the value of a bond given by Waller to Arthur Waller, and sued in the county court of Halifax, in the name of A. Waller, and obtained a verdict. Waller, the defendant, appealed, and

gave Pittman for surety in the appeal bond. The plaintiff obtained judgment in the Superior court, and took out a *scifac* upon the appeal bond, against Pitman. Upon examination of the bond it appeared there was omitted out of it, the clause obliging the surety to pay the debt &c. whereupon he was discharged by a judgment of the court. The plaintiff then filed this bill, and stated the omission, and that it was by mistake that defendant understood he was bound to pay the principal debt when he entered into the bond, in case of a judgment against his principal; and that he had gotten from Waller, the defendant, an indemnity. The plaintiff's counsel observing that the *mistake* had been denied, said he would rest his case upon that circumstance alone; and said the difference was this; where a bond was given by a surety, as the parties intended it to be, but by a subsequent event the surety became discharged at law, he will not be charged in equity; but where by *mistake* or *unskilfulness* of the drawer, the bond is drawn not according to the understanding of the parties, and thereby the plaintiff is disabled to recover, equity on account of the mistake, will relieve. He cited 1 Ark. 32. Ch. Rep. 99. 2 Wash. 141. *Econtra* was cited Ch. C. 125, stated also at the end of Francis's Maxims.

The court took time to consider of the cases, and on the last day of the term, decreed for the plaintiff, upon the ground of mistake in drawing the bond: and the court held that the plaintiff need only prove a valuable, not an adequate consideration to entitle himself in equity.

### *Taylor vs. Wood's executors.*

Wood had obtained a judgment against Taylor as a collector, without giving him notice by motion for judgment in the county court, for a considerable sum more than was due, and enforced payment. Taylor sued him at law for a reimbursement, and obtained a verdict, but could not get judgment, because it was a suit to recover what had been recovered by judgment. He then sued in equity, stating in his bill all the circumstances; and the court relieved him, and gave him a decree for the excess taken from him by Wood.

Wilmington, November Term, 1804,

### *John London vs. Henry B. Howard.*

ON the 10th November, 1801, John Barclay gave to the defendant a promissory note, which on the same day was endorsed by the defendant to the plaintiff. The note being payable on



demand, the plaintiff in the presence of the defendant, asked Barclay when it should be paid, and was answered, in a day or two. On the 26th of January, 1802, Barclay became a bankrupt, and no other demand for payment from Barclay, besides what is above stated, appeared to have been made by the plaintiff before the day when Barclay failed; and no notice of the refusal or inability of Barclay, given to the defendant, until after Barclay's failure. It further appeared, that between the 10th of November, and the 26th of January following, the plaintiff received from Barclay considerable sums of money in payment of other demands. All the parties lived in Wilmington, and were commercial characters.

*Taylor*, Judge, submitted it to the jury under all the circumstances of the case, to decide whether the plaintiff by his delay or indulgence to Barclay, had not made the note his own, and discharged the defendant. The strict rule laid down in the English law books respecting bills of exchange and negotiable notes, have never been deemed in force and in use in this state; and it was impossible to lay down an universal rule at the time when demand of payment should be made of the maker of the note, and notice given to the indorser. The rule must depend on the local situation and the respective occupations and pursuits of the parties. In this case he thought that the indulgence given by the plaintiff to Barclay, was too long, and that the plaintiff should sustain the loss occasioned by Barclay's failure.

Verdict for the defendant.

### *Wilking's vs. M'Kenzie.*

**T**HIS cause again came on to be tried before Judge *Taylor*, and the same evidence was given as on the former trial, except this addition, that M'Kenzie being about to leave town, Wilking said to him, *how shall I get your endorsement?* M'Kenzie answered, I will leave an order which will secure you. The Judge left it to the jury to determine whether this evidence proved an agreement on the part of M'Kenzie, to indemnify the plaintiff in case of a non acceptance of the bill. If they thought it was, then a verdict should be found for the plaintiff; if otherwise, for the defendant.

Verdict for the plaintiff.

### *Howard vs. Ross.*

**T**HE defendant owned a vessel, which he had contracted with Noble to leave to his management and custody; that Noble should victual and man her, and take in freight when and where he thought proper, and should account for one third of the pro-

fish to the defendant. He took in a load, on freight, at New River, for Howard, to be carried to Wilmington, put into an intermediate port, took in more lading, and thereby the vessel and cargo was lost.

It was argued for the defendant, that the action lay against Noble, and not against Ross, under the above circumstances. Noble was the owner *pro tempore*, he being completely from under the controul of Ross, who could not oblige him whilst the contract lasted, to observe any directions Ross could give him. The defendant's counsel cited 2 Str. 1251, and the American Law Mercatoria, 103.

*Taylor, Judge.* Ross continued to be owner notwithstanding this contract, and is liable for the undertakings and miscarriages of Noble. The case in *Molloy*, 229, 230, is not law, so far as it states the master only to be liable for a deviation or battery.

There was a verdict for the plaintiff, and a motion made for a new trial; and on the appointed day was fully argued; and now on this day, being near the close of the term, the court gave judgment.

*Taylor, Judge.* An owner is liable for the contract of his captain; and is discharged from his liability, if he parted with the management and controul of the vessel to the captain, upon a contract to receive part of the earnings of the vessel. Here however the contract was made by the owner himself, with the plaintiff, which shews he still considered himself an owner. As to the damages to be recovered, the owner should not be charged, but for the value of the goods at the port of reception. The case cited from 2 Burrows, 1171, and other cases upon the subject, the principles of which are analogous to the present case, seem decisive upon the subject, and there must upon this ground be a new trial, unless the plaintiff will remit the difference between the value at the port of delivery, and that at the port of departure.

The plaintiff remitted accordingly, and had judgment for the residue.

### *Welch vs. Gurley.*

**THIS** action was instituted by process of attachment; and Mrs. Sneed, as the administratrix of her deceased husband, was summoned as a garnishee, to discover whether her intestate did not owe a debt to Gurley, the defendant. It came up by appeal from the county court of Onslow, and was now argued by *Gaston* and *Haywood* for the garnishee, and by *Jocelyn* for the plaintiff.

The counsel for the garnishee, made a previous question, to

wit: whether an administratrix could be compelled, as a garnishee, to appear and answer.

*Per curiam*—TAYLOR, Judge. She cannot; because having not contracted the debt, she cannot be presumed enough conversant of the transaction to answer. Also, she cannot by plea put upon the record the plea of *plene administravit*, or bonds, or judgments outstanding; for no such plea, nor indeed any plea, is allowed by law to a garnishee. All she could do, would be to answer the interrogatories put to her; and if in fact she had *fully administered*, she might, by a judgment against her as garnishee, be forced to the commission of a *devastavit*. Should an issue be directed as to the debt itself between her and the plaintiff, what evidence could be given on the trial? the bond, note or other evidence of the debt, would be in possession of the defendant, and could not be produced on the trial. If less evidence than that would do, then she could not tell how to plead as to assets, were she allowed a plea; whereas if sued by the defendant, she could know by demanding Oyer, before she pleaded of what nature the demand was; and would defend herself, as to assets, accordingly. If she could on her garnishment put such defence on the record, which is much to be doubted, then she would be compelled to swear to the plea, which in all other cases she is not obliged to. Moreover, if she confessed the debt in part, not knowing precisely the amount, she would be condemned to pay it, and would not be discharged as other garnishees are; for a second and third creditor might still call on her as a garnishee, and proving more of the debt, still due, might have a second and third judgment against her; which is not the case with other garnishees. Also, the assets in the hands of the executor, might by means of an attachment and garnishment, be paralyzed; for while the executor was held up as a garnishee, no other creditor of the testator ought to be permitted to recover against him, since he is so far bound by the garnishment, as if eventually there should be a condemnation, he will be bound to produce the assets attached in his hands. This would open a wide door to fraud, for just creditors by such means might be kept off at pleasure.

Garnishee discharged.

### *Court of Conference,*

Raleigh, December Term, 1804.

*Churchill and Lamotte vs. Howard.*

THE question here was, whether the defendant, who was executor, could plead judgments obtained against him since

the last continuance : and the court now decided that the defendant must plead at first the true state of his assets ; otherwise he might delay the plaintiffs until after a bond debt become payable—then suffer judgment in that, and bar the present plaintiff by pleading a judgment upon a debt not due till long after the commencement of the present suit.

*Howard vs. Person's heirs.*

THE court granted a new trial, because General Person, the intestate, being bound by his promise to procure a tract of land of a certain description, for the plaintiff, by the time he should come of age ; and having not done so, the jury should have assessed damages according to the value of such lands at the time of his arriving to age ; whereas they assessed them by taking the value at the time of the verdict.

And we will not require of the defendants, as a condition of the new trial, that they shall not insist upon the act of limitations.

*Ormond vs. Faircloth.*

THE court in this case determined, that a sheriff at an execution sale, made by himself, could not become a purchaser, and that a sale to himself was void. Secondly, that a sheriff is bound to advertise an execution sale, ten days at least before the sale ; and must expose the property to public auction, and cannot sell at private sale, as sheriff.

*Wynn vs. Always.*

THE court decided unanimously, that the choice of a guardian is solely and exclusively in the breast of the county court, and that they are in no respect bound to attend to the choice made by the ward, whether above fourteen or under.

*John C. Stanley vs. Turner.*

THE court, consisting of *Hall, Taylor, and Locke*, Judges, unanimously decided, that a possession of lands for seven years, must be *adverse*, and accompanied with *colour of title*, to create a bar under the act of 1716, ch. 27. This case had been argued in June Term last, and they had taken time to consider of the opinion till the present Term.

*Lavender vs. Pritchard's administrator.*

**T**HE plaintiff offered a witness, who was surety in the appeal bond ; and an objection being made to his competency on this account, the plaintiff's counsel offered to give another surety in his place.

*Taylor*, Judge. Withdrawing this surety from the appeal bond, would discharge the bond ; therefore, in case of withdrawing at all, another new bond must be given, to be signed by two new sureties : This the plaintiff could not do ; so the witness was rejected.

Other evidence was then laid before the jury, and the gift to the plaintiff by Pritchard was proved thus :—Pritchard came to the house of Lavender, having some ears of corn in a wallet, and after getting into the house, said to the plaintiff, a child, “ *I give you all my corn and all my hogs, my horse, (naming him) and my boy ;*” (naming him.) He then took out of the wallet, an ear or two of corn, and said, *here take of the corn I have given you*—and gave the child an ear or two.

The jury found a verdict for the plaintiff, with damages for all the property claimed by the plaintiff. A new trial was moved for, on the ground that a gift *inter vivos*, could not be perfected but by a delivery of the very thing itself given ; not by a symbol or representative of the thing given. Secondly ; if a symbol would do, the thing used as a symbol, should be delivered expressly in the name of the thing given : And here it was not said for what purpose the corn was given, nor whether it was intended as a representative of the whole or of any part of the property. The defendant's counsel cited 2 Vezey, 442. 2 Bl. Com. 442 ; and they challenged the other side to produce a single case at the common law, where it is said that a delivery of something, in lieu of the thing given, was a sufficient delivery to complete the gift. Judge *Taylor*, who had directed the jury that a delivery of part of the thing given, was a good delivery of the whole of that species of property, took several days to consider of the motion for a new trial, and came into court with divers books, which he read in support of his former opinion :—Our law, he said, was taken from the civil law, which allowed of a possession of part to be given in the name of the whole ; 1 Brown Civil and Admiralty Law, 256. He said it was also analogous to the common law, respecting the seizen of lands or of rents where one thing may be given in the name of seizen of the rent or land.—He cited 1 Inst. 1596, 160, 315. It was true, he said, there are not many old books which treat of this subject ; because in ancient times, personal property was not considerable enough to engage the attention of law writers. He said the doctrine which he delivered to the jury was to be found

in modern books, particularly in Wood's Institutes, 242, where it is said, "Upon a gift, or bargain and sale of goods and chattels personal, the delivery of six pence or a spoon, is a good seisin of the whole." Here was a delivery of part of the corn which the jury are at liberty to consider as a delivery of the whole corpus, of which that thing was a part. But it cannot be considered as a delivery of all the things given, because the horse, one of the articles enumerated in the gift, was present, and might have been delivered, and yet was not; and as to the hogs and Negro boy, no words were expressed to shew an intent that the ear of corn should be a symbol of these. There must therefore be a new trial, unless the plaintiff will release the damages for all but the corn.

They did so, and the verdict stood for the residue.

### *Churchill vs. Speight's executors.*

**TAYLOR, Judge.** This is an action of debt on a single bill; the general issue is pleaded, and payment. To prove the bill, the subscribing witness is sworn, he believes his name subscribed thereto, to be of his own hand writing. He remembers that he attested a note from Speight to Sheffield, (who assigned to the plaintiff,) and that he never attested more than one paper of that description. He does not believe the signature of this paper to be in the hand writing of Speight; nor does he remember or believe, that there was a seal to the paper he attested. Where circumstances are proved, which could not have existed unless the principal fact also existed, such circumstances are proofs of the principal facts. Then his hand writing to this paper, when he never subscribed to another of the like kind, leads to a conclusion that this is the very paper which Speight executed: and then the signature is the signature of Speight; and if so, the words in the body of the paper are his likewise; and these speak of his seal as well as of his hand, which is a persuasive evidence of his seal. The jury will therefore consider whether the seal is proved or not. As to the payment, the witness says the note he speaks of, was given for a tract of land, which Sheffield conveyed to Speight. He says also, they came to a settlement afterwards, and the note was included in it; that the deed was re-delivered to Sheffield, and he admitted the note was discharged, but that it was lost or mislaid. It appears, however, that the deed was recorded before the re-delivery. If the obligee agrees to accept of something as payment, supposing it to be of a certain value, the payment is not good. Here the parties supposed the re-delivery of the deed was a restoration of the title to Sheffield.—It does not restore the title; that still re-

pains in Speight ; the re-delivery of the deed was of no value, and the intended payment is, therefore, not good.

Verdict for the plaintiff.

### *Templeton vs. Pearse:*

**T**HIS was covenant upon a sealed instrument, for payment of money ; and the defendant has suffered judgment by default. He now applies to be at liberty to give in evidence to the jury, a counter agreement signed by the plaintiff, engaging to make deductions on certain events which the defendant says have taken place ; and to incur a penalty if he did not make such deductions.

I am of opinion the defendant cannot give this counter agreement in evidence, for the purpose of reducing the damages.— The plaintiff ought to have had notice thereof by plea, if indeed it could be at all used by way of reducing the damages in this action.

### *Parkins vs. Cox,*

**T**AYLOR, Judge. It is not waste to clear tillable land : for the necessary support of his family, though the timber be destroyed in clearing ; nor is it waste to cut down timber, for making or repairing fences, necessary buildings, or plantation utensils : but it is waste to cut down timber for sale ; so it is waste to collect together the lightwood, and extract tar from it— for that is a permanent injury, as it takes several years to produce as much lightwood. If the tenant is to have liberty of burning lightwood for tar, or felling the timber for sale, it should be conceded to him, in the lease.

### *Jaspers's administrators vs. Tooley's administrators.*

**T**AYLOR, Judge. Covenant will lie on a bond in a penalty, with condition for conveying to the plaintiff half of the Negroes that shall be recovered from a third person, in the name of Tooley, but at the expence and under the management of the plaintiff. The defendant's counsel had argued, that a condition, following the penalty of a bond, was so far from being a covenant or engagement on the part of the defendant, that it was insisted expressly for his benefit, and to relieve him from the penalty ; and that he might or might not make use of it at his pleasure.

*Quere* of this opinion of the Judge, for it is not law.

### *Spivy vs. the administrator of Farmer.*

**T**HIS action was brought for, that the intestate of the defendant enticed and persuaded a Negro man of the plaintiff to

attempt to transport him in a flat across the Neuse river, with a load which rendered the attempt dangerous, when the river was swelled and rapid: In consequence whereof, the flat sunk, and the Negro, as well as the intestate himself, were drowned.

*Taylor, Judge.* It is not material that this was not a ferry licensed by law, and within ten miles of another ferry; whereby it was illegal to ferry persons over for a reward. The Negro was usually employed by his master to ferry over travellers and others for a reward; and that is equivalent to a command from the master to carry them over when applied to: it places him in the light of a common carrier. The true question is, whether the defendant's intestate induced the Negro to take in such a load as was obviously and plainly, without calculating upon chances, too heavy for the vessel to sustain, whilst there was that swell in the river. Secondly—the witness and his horse was taken in at the same time with the intestate, his horse, and two oxen; and neither they nor Farmer apprehended danger from the weight of the load. It is therefore apparent that the load was not such an one as obviously endangered the vessel.

Verdict for the defendant.

### *State vs. Fellows.*

**TAYLOR, Judge.**—The person who is to be entitled to a restitution of possession, in case of a conviction on an indictment of forcible entry, cannot be a witness on the trial; and if the indictment has been found on his single testimony, it ought to be quashed.

And this indictment was quashed for that cause, though there was other testimony now ready to support it.

### *Anonymous.*

**THE** witness offered, had said that he was to have a part of the recovery; and this being proved by witness, in support of the objection to his competence—*Wood*, for the plaintiff, drew a release, which he executed, and then offered the witness.

*Taylor, Judge.* He is as much incompetent now as he was before. The plaintiff was not bound before to give him part of the recovery, by any engagement which had the support of law; and therefore the release discharges no legal obligation. The confidence of the witness in the promise made to him by the plaintiff, though that promise is of no force in law, is what excludes his testimony, and that is not removed by the release.—However, said he, you may examine the witness for the present, and reserve the question of competence in case a verdict should be found for the plaintiff.



*Quere*, if it should not have been proved that plaintiff had agreed to give part to the witness. A witness cannot disqualify himself,

*Simmons vs. Radcliff.*

**T**HE plaintiff had sued the defendant in an action of trespass. *Quare clausum fregit*, and died during the pendency of the action. An abatement was entered, and execution issued against his representatives for costs.

*Harris* now moved to set aside the execution for costs: and a day being appointed to hear him in support of the motion, he argued that no costs were paid upon an abatement by the law as it stands in England; nor is there any provision for payment of costs in such case by our law, which only directs costs to be paid by the plaintiff on a *non-suit, dismissal or discontinuance, or judgment* against him. And without the express directions of an act for that purpose, a judgment cannot be entered against the estate of a dead man, as a judgment to pay costs must be if entered upon an abatement by his death.

*Counsel for the defendant.*—The constant practice ever since the passing of our act of 1777, ch. 2, sec. 99, hath been to issue executions as this has issued; and the practice in such cases is a good expositor of the act. An abatement by death, though not mentioned in the act, is within its equity. A discontinuance or non-suit may not be by the voluntary act of the plaintiff. A want of preparation for the trial by non-attendance of witnesses or other accidents or irregularity in conducting the pleadings, may occasion them: and yet the plaintiff pays costs, because he has been active in causing expense whilst the defendant was passive; and the plaintiff has not demonstrated the justice of his procedure by the event, and not till then can he shew the justice of compelling the defendant to pay them. So in all other cases where he has caused the accrual of costs, and has not proved the defendant ought to pay them, he must himself be responsible, as much as in cases specified in the act.

*Taylor, Judge.* A nonsuit is within the equity of the sixth section of the act of limitations, and I think the case of an abatement by death is within that of the 99th section of the court law. But I differ from both the gentlemen with respect to the *mode* of obtaining costs from the estate of the plaintiff. A process in the nature of a *sci. fu.* ought to issue to bring in the representatives, and the judgment should be entered against them before the execution issues.

Referred to the Court of Conference.

*Note.* Executors pay costs in this country, because the *party* in whose favor judgment shall be given, shall be entitled to costs. That must be from his adversary, whoever he be.

*Fish vs. Lane.*

**T**HIS Bill in Equity stated that Fish discovered an error in the patent under which he held; by which error all the land he claimed was left out of his boundaries. It stated, that Lane represented to Fish that the law would not admit of a correction of the error; and advised Fish to employ him, Lane, to cover it with a warrant he had, to obtain a grant in his name, and to convey to Fish with warranty. It stated also, that Lane engaged to take the notes of the complainant and his brother, and to return the notes to the plaintiff, should he ever get the error rectified; and that the error was rectified; and that Lane would not give up the note, but sued upon it and recovered. It was objected for the defendant, that the matter here stated, might have been proved at law; and the plaintiff would thereupon have had the same relief as he now seeks.

*Taylor, Judge.* It is also stated, that the present defendant, on the trial at law, concealed facts which, if they had been known, would have prevented his recovery. Concealment of material facts is a good ground for coming into this court after a trial at law.

The bill was therefore not dismissed, but on issue, was made up and tried.

Edenton, April Term, 1805.

*Rhea versus Norman's executors.*

**A** WILL, dated the 12th of February, 1804, had been proved, and another was offered for probate, dated the 14th of the same month. On the trial it appeared, one witness subscribed, and then the testator inserted the word *February*, and seemingly in the place of another word; after which the witness attested.

*Taylor, Judge.* There ought to be an attestation by two witnesses of every part of a will of land; and therefore this will, if good at all, can only be so for the personalty.

I do not mean to question the correctness of this decision, but to excite enquiry. Is the date of a will more essential than the date of a deed? If not, the will as to the lands, will be considered as a will from the time of its execution; to be ascertained by the evidence, in like manner as a deed shall take effect from the time of delivery; though it has no date, or a false or impossible date, or if it delivered before or after the date: *vide* Co. Litt. 6. a. 2 Rep. 5. a. 3 Leonard, 100. C. D. Fait. B. 3. If the date be unessential, then the act of Assembly only requires

the attestation of two to those parts of the will which are material. Besides, what is *attestation*? Certainly an undertaking to prove that which passes in his presence; and then he is as much a witness to the word *February* being used by the testator to express the time of execution as to the other parts of the will.—Judge Taylor granted a new trial in this case, but upon what ground, the Reporter does not know, having not been present.

### *Sutton vs. Blount.*

**EJECTMENT.** The defendant offered in evidence, a survey made in the year 1728, as he said, upon a complaint made, that the land of Wilkinson, adjoining that of Blount, and bounded in part by a part of the third line of Blount's land, contained more than the patent called for. The survey, he said, was made, in consequence of such complaint to the Governor and Council, by a Mr. Moseley, the then Surveyor-General of the province of North-Carolina.

Taylor, Judge. This survey is no evidence against Sutton, who claims under Blount's patent; for as to Blount, it was *ex parte*, and made behind his back. Moreover; this survey is stated to have been in consequence of an order issued by the Governor and Council.—Then the proceedings before them should be produced, otherwise the survey has no foundation; and Mr. Moseley could not, at the mere instance of some stranger, make a survey of Wilkinson's land, and thereby affect Blount's title to the land he claimed.

The survey was rejected.

### *Ridley's administrators vs. Thorpe.*

**THIS** was an action of debt upon a bond given on the 28th of September, 1772, and payable on demand. The defendant, who was the heir of the obligor, and was sued in that character, pleaded *payment*; that *there were personal assets sufficient in the hands of the administrator and next of kin, and the act of 1715, concerning the proving of wills and granting letters of administration, &c.* It was proved that Peterson Thorpe, the obligor and ancestor of the defendant, died in May, 1777; and that Timothy Thorpe administered, and had assets more than sufficient to pay all his debts; that Day Ridley, the obligee, died in June, 1777, leaving the said Timothy Thorpe his executor, who qualified as executor the same month; that the said Timothy died in 1787, and an administrator was appointed for his estate; administration, *de bonis non*, of Day Ridley, was granted in 1790, and a like administration for the estate unadministered of the said Peterson was granted in the year 1804.

*Taylor, Judge.* Where a bond has not been sued upon for the space of twenty years, nor interest paid upon it in that time; and if the plaintiff cannot account for not suing in the time, a jury are at liberty to presume the bond to have been paid. The defendants rely upon length of time, as such evidence of payment in the present case. The plaintiff says he has accounted for not suing from 1777 to 1787, by proving that one and the same person, during all that time, was the representative of the obligee and obligor, and so could not sue himself. The defendants, on the other hand, say the presumption is much strengthened by this circumstance, and indeed they say that it is of itself tantamount in law to payment: They rely upon the case of *Dorchester and Webb*, Cro. C. 372, 373. The amount of that case is that the plaintiff was the executor of the obligee, and also the executor of the obligor; but at the death of the obligor, or after, she had not any of the effects of the obligor, wherewith she could pay the debt; and because she had no such assets, the court adjudged she might maintain her action against the co-obligor of her testator. For, said the court, although she be executor to John Dorchester, the other obligor, yet when she hath fully administered all the estate of the said John Dorchester, before she be made executor to Ann Rowe, (the obligee) she hath in a manner discharged herself of being executrix to John Dorchester, and hath not any thing of his estate. This case allows the circumstance of being representative of both, and having assets sufficient of the obligor to afford a very strong presumption of payment; and the jury may take into consideration a calculation of the principal and interest due upon the bond to be endorsed thereon, as made the 21st December, 1779; also the circumstance of the administrator of the obligor permitting the widow to remove from Virginia to North-Carolina, with 18 or 20 Negroes, in the year 1780. As to the act of 1715, the plaintiff's counsel insist it cannot run on from 1777 to the end of the war; nor after 1787 till 1790; because in the intermediate time, there was no person who could have sued upon the bond; and that if the act does not take effect at the end of the first seven years, next after the death of the obligor, it never can take effect at all. My answer to these remarks is this: The act of 1715, requiring creditors of any person deceased to make their claim within seven years after the death of such debtor, otherwise such creditor shall be forever barred, makes no saving whatsoever for any person under any circumstances; and my Lord Coke says, where the Legislature have made no exceptions, the Judges can make none; and that infants and feme coverts would have been barred by the common act of limitations, had they not been excepted therein. The court, indeed, goes so far as to say, that a case like one of those excepted by

the act, shall be within its equity and government, but it cannot make an exception of any kind, where the act itself has not made any exception. Then admitting that the act 1783 has suspended the operation of all acts of limitation during the war, this act will remain afterwards; and if seven years elapse without claiming the debt, though not the next seven years next after the death of the debtor, the creditor will be barred; for it cannot be law, that the creditor is left without limitation, if for some cause the first seven years cannot be computed.

Verdict for the defendant, and judgment.

## Wilmington, May Term, 1805.

### *Larkins vs. Miller.*

**T**HE defendant's fence included about a quarter of an acre of the land in question; the rest of the field enclosed by the fence, belonged to another tract.

*Hall, Judge.* The possession of this quarter of an acre, is the possession of all the disputed tract of which it is a part; such possession will prevent the running of the act of limitations against the defendant. Both parties have colour of title under different grants and deeds, and the perfect title is in him who has had the requisite possession.

The plaintiff suffered a nonsuit.

### *Parker vs. ———*

**T**HE plaintiff sued the defendant for his freedom, by a writ returnable to this court; whereupon the defendant put him in prison. The plaintiff's counsel complained of this to the court, and moved for an *habeas corpus*; and the court ordered one, to bring him in a future day in the Term; and ordered notice to be given to the defendant. The plaintiff was brought into court on the day appointed, and examinations in writing were taken to prove the probability that he was free; and a strong case was made out by them—these were filed in court. The court ordered that the defendant either should give security to leave the plaintiff at liberty, until the next term, to go whither he pleased to procure testimony; or should submit to the court to go immediately into the consideration of what was proper to be done in the *habeas corpus*. He chose the former; and then the court proceeded no further in the *habeas corpus*. The defendant was ordered to give bond and sureties accordingly; and the plaintiff was released from imprisonment.

The action brought by the plaintiff was, trespass for false im-

prisonment; to which the defendant pleaded that the plaintiff was his slave; and issue was joined thereupon.

*Court of Conference,*

Raleigh, June Term, 1805.

*Matthews vs. Daniel.*

**P**ER Curiam.—The testator devised a Negro man and a horse, to his daughter and her heirs; and if she dies without heirs of her body, then over to the defendant. This is not good executory devise; the event is too remote upon which the limitation over is to take effect. The argument, that here the event must happen, if at all, in the life time of the Negro, and that so the event is limited to alife in being, has at least the merit of novelty to recommend it, but will not bring the case within the legal limits.

The demurrer must be over-ruled, and the defendant answer.

*Circuit Court of the United States.*

Raleigh, June Term, 1805.

*Dunlop & Co. vs. West, the Marshal.*

**P**ER Curiam.—If the Sheriff or Marshal seizes property in execution, and neglects to sell it, and is sued for his neglect, the plaintiff shall recover damages, to the amount of what the property would have produced, had he sold it.

*Mutter's executors vs. Hamilton.*

**P**ER Curiam.—We will not grant an injunction so as to stay trial, or entering up judgment; therefore this cause now ready for trial shall not be postponed, although the bill in equity which has been read, for obtaining an injunction, may contain matter enough to warrant the granting it.

———. *vs. Lewis's executors.*

**P**ER Curiam.—The act of 1715, whilst it was unrepealed, was suspended from its usual operation by the acts disqualifying British adherents to sue in our courts. It did not begin to ope-

rate as to such persons till the end of the war, and then if the seven years were not completed before it was repealed by the act of 1789, no bar could ever be operated under it. Lewis, the testator, died in 1780; between the end of the war and 1789, were not seven years. The demurrer to the plea, stating these facts, and relying upon the act of 1715, must be allowed.

Plea held good.

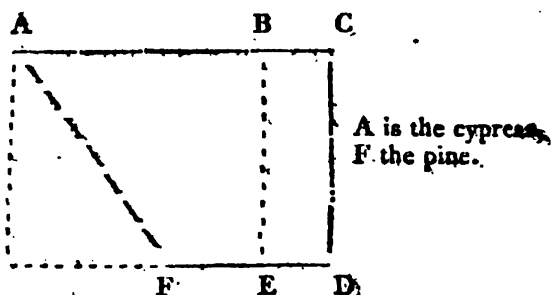
## Newbern, July Term, 1805.

### *Loften vs. Heath.*

**EJECTMENT.** *Per curiam*, TAYLOR, Judge.—The plaintiff insists that the beginning of the defendant's tract is at a *cypress*, and that the fourth corner is a pine upon the creek, and so along the creek to the begining; in which case the land in dispute is left in the plaintiff's patent. The defendant insists that the *pine* is the *beginning* tree; that the original survey actually began there, and ended at the cypress; in which case the land in dispute is within the defendant's patent. The creek is not parallel to the second line, as probably the surveyor supposed, but runs transversely from the *cypress to the pine*. The distance of two hundred poles from the pine, and then the course of the second line will intersect the line from the cypress, at a much greater distance than two hundred poles from the cypress. — Running from the cypress 200 poles and there stopping, and from thence running the second line, will intersect the line from the pine, at a much less distance than 200 poles. It is in evidence from the hearsy of the chain carriers, now dead, that the original survey began at the pine, and from thence to the second corner, and so to the third, being the courses that the defendant contends for. It is also in proof that the former courses of the defendant's tract called the cypress the beginning of the tract; and the patent says, beginning at a cypress. It is contended on the part of the plaintiff, that as the patent calls for a cypress as the beginning of the tract, the defendant cannot be allowed to depart from the words of the patent, and say that the *pine* is the beginning, and not the *cypress*. I will not say whether it was wise or not in the first instance, to depart from the words of a grant; but many decisions of our courts have allowed of such a departure, in order to fix the location where it *really* was made originally. He cited and stated the case of Person and Roundtree, which he said had been followed up by many other cases to the same effect. It must now be taken as the law of this country, that notwithstanding any mistake or wrong description either in the platt or patent, the party,

who is likely to suffer by it, may by parol testimony, shew the mistake, and prove the location of his land by testimony dehors the patent; and upon making clear proof thereof, shall hold the land actually laid off for him. Consequently if the jury are well convinced that the original survey began at the *pine*, they ought to find for the defendant.

Verdict for the defendant.



### *Brady vs. Ellison.*

**B**RADY was sued by Worsley, and was apprehensive of a recovery: Ellison represented to him that the plaintiff was likely to recover—and that Brady and Ellison *agreed* that Brady should convey to Ellison his land, which Ellison should reconvey, if Worsley should not obtain judgment; but if he should, that then he should convey to Brady's children.—Worsley was non-suited, and Ellison refused to recover the land.

*Per curiam*.—If Worsley was a creditor, the conveyance intended to defeat him, was a fraudulent conveyance; and an assumpsit by Ellison to restore the lands, was void. The act of Assembly says, the contract shall be valid between the debtor and his grantee; and why?—To deter the debtor from the attempt, by placing him in the power of the grantee. This obstacle to the attempt would be completely removed, if the plaintiff could legally bind himself to restore the property or its value, and the debtor could practise a fraud on his creditors without the least risque: for after he had succeeded in defrauding his creditors, the law would interfere in his favor, and enforce the returning of his property by the vendee.

If Worsley, however, was not a *creditor*, then the conveyance is not fraudulent—and there is no legal objection to the contract, which the plaintiff has sued on.

Verdict for the plaintiff.



*Gardner and Devereux vs. Smallwood.*

**T**HE defendant was owner of a vessel, bound to New-York, and took in freight, part of a load belonging to the complainants, for which they gave him the full price. The captain stowed part in the hold, and part on deck, as was contended. The cargo, as well in the hold as on deck, was injured by a storm.

*Per curiam*.—Taking a full price and stowing upon deck, will subject the owner of the vessel to pay damages, if what is placed on deck be *thereby* lost or damaged; but if *that* did not occasion the loss, he will be no more liable for damage to that part of the cargo than to the rest of it.

*Vide New-York Term Reports, 43.*—Goods shipped on deck, the shipper paying one half freight, if ejected in a storm, shall not have contribution from the goods in the hold, and the owner of the vessel is not liable.

N. B. In the above case, the owner of the ship, the defendant, offered the captain as a witness to prove the loss to have been occasioned by distress of weather, and not by any neglect on his part; but the court would not receive him till released by the defendant. The court said it is not like the case of a shop-keeper's servant becoming a witness.

*Den, on the demise of Ellison, vs. Brady.*

**T**HE defendant died, and the plaintiff prayed a *scire facias* against his heirs at the first term after his death—but it was not served till after the second term.

*Harris* now insisted that the action was abated, because the heirs shall be brought in at the second term by an actual service of the *sci. fa.* before.

*E contra*, it was argued that issuing the *sci. fa.* from the second term, upon an application made in that term, is sufficient to pervert the abatement.

*Curia advisari.*

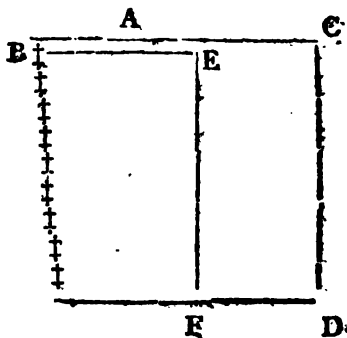
*Harris vs. Powell's heirs.*

**T**HE plaintiff's patent called for a *white oak*—then the second line—then the third to the creek—then down the creek to the beginning. He proved a marked *white oak*, on a branch emptying into the creek, and running from thence so as to form an acute angle between it and the creek. He proved also a red oak at the third corner, and a red oak was called for in the patent—and that where the red oak stood, the second line would terminate, if drawn from the end of the first line, beginning at

the white oak. This white oak standing on the branch, was at the distance of two or three hundred yards from the creek.

Under the charge of the court, however, the jury found a verdict establishing it as the beginning, and the verdict remained undisturbed.

This verdict was found on the hearsay of a witness now dead, who heard a former proprietor now also dead, say that the white oak was the beginning tree; and on the hearsay of another witness, who said he ran out the land for the said proprietor when he purchased it, and began at the said white oak, in the year 1766. The original survey was made in 1753, or earlier.



If the beginning was at A, then C D was the true line of the patent. If at B, then E F was the true line. The plaintiff claimed to C D, and prevailed, as the white oak at A was established instead of the beginning at B on the creek.

### *Gaskill vs. Dixon.*

**PER curiam.**—The plaintiff has sued the defendant upon a contract of marriage—and he insists, by way of excusing himself for the non-performance, that after the contract, he discovered she was a woman of impure and unchaste habits and practices, and has attempted to prove her so. If he has succeeded to the satisfaction of the jury, I am of opinion it will form a *complete defence* for him against the action, and will not be in mitigation of the damages only. She held herself up to him as a chaste and undefiled woman. Upon *this* as a *condition*, he contracted—and surely he is released from his engagement when she is found to be otherwise, for the condition on her part is not complied with.

The jury disbelieved the defendant's witnesses, and found a verdict for the plaintiff, with heavy damages, and she had judgment.

*Garland's executors vs. Goodloe's administrators.*

**T**HIS action was brought on a warranty contained in a bill of sale of a negro woman, made by Goodloe to Garland, and which had been recovered from Garland by Mrs. Pescot.

The bill of sale was given in 1783, and on the trial, the following points were determined :

That the certificate of its probate and registration could not prove a copy, because the bill of sale did not require registration when it was made : the law of registration passed since, and the officer was not entrusted to certify in such case.

Secondly ; the loss of the bill of sale may be proved by the plaintiff, and parol evidence of its contents may be given, there being no copy.

Thirdly ; the subscribing witnesses were proven to be dead, and others were suffered to prove the contents.

Fourthly ; it was proved that Goodloe had notice of the pendency of the suit by Mrs. Pescot, and the record of her recovery was therefore admitted against him as conclusive evidence of her superior title.

Verdict and judgment for the plaintiff.

*Jasper's administrators vs. Tooley's executors.*

**T**OOLEY, in his life time, had given a bond in the penalty of five hundred pounds, with a condition underwritten, that if Tooley should recover certain Negroes, and should deliver to said Jasper one half of them, and one of them taking one, and the other another, and so on till all were divided, that then the above obligation should be void.

The plaintiffs brought covenant, and at this term obtained a verdict for £. 757 ; and it was moved in arrest of judgment, that covenant would not lie on this bond, nor on the condition thereof, nor would any action lie on the condition.

*Haywood*, for arresting the judgment, cited *Haywood's Reports*, 215. 1 B. Ab. 529. 2 Mo. 36. Cro. J. 281. C. Digest, *Verbo* Covenant, A 3. Salk. 326. Sh. Touch. 158, 159.

HARRIS, *e contra*, cited 3 C. Digest, 257, 258, A 2.

*Curia adversari vult.*

*Rhodes vs. Gregory's administrators.*

**R**HODES took an attachment against Frazier for a debt due from him, and delivered the same to Gregory, the sheriff, who seized a Negro, and returned upon the attachment, that he escaped. Whereupon he sued Gregory in an action of debt upon the case, for negligence and misconduct in his office : Gregory died, and his administrator was brought in by *scire facias*.

And it was now insisted by Mr. *Graham*, for the defendant, that such an action would not lie at the common law against executors; nor will it by force of the act of 1799, for that only makes a trespass survive against executors, where property, either real or personal, is involved in the decision to be made upon it.

*HARRIS, e contra.*—Either trespass extends to trespass on the case, as well as trespass *vi et armis*; or if not, the equity of the act extends to this case. The motive of the act was to prevent a wrong by the death of the defendant, by subjecting his estate to make compensation. Here a wrong is done the plaintiff, and he cannot recover satisfaction for the debt he has lost, unless he is suffered to maintain this action. It is not pretended any other will lie.

*Per curiam.*—It has been decided in the Court of Conference, that such an action is not maintainable against executors after the death of defendant, then testator.

On the importunity of one of the defendant's counsel, the Judge agreed to carry the cause to the Court of Conference.

### *State vs. Roach.*

**T**HIS was an indictment for passing counterfeit dollars, knowing them to be such. It was found in January term, 1804. The defendant pleaded to it, and it now stood for trial. The defendant's counsel moved that it might be quashed, because there was no day stated on which the offence is supposed to have been committed, though the year is stated: there is a blank left in the indictment for the day and month. They said it was useless to proceed to trial, since the court must see no judgment could be given upon a conviction: and they cited 2 Hawk. P. Crown, 258. 259.

*Per curiam*, after argument.—The defect which is pointed out, would be fatal upon a motion in arrest of judgement; and though it is true as has been argued, that the court has a discretion to quash or not, still it will quash where it is plain no judgment could be given in case of a conviction:—Therefore let this indictment be quashed, but the defendant shall not be discharged, but must be bound over to another term to answer the charge.

### *Anonymous.*

**T**HIS bill, answer and depositions, to save time, were left by consent to be determined by the court; and on opening the bill and answer, it appeared the plaintiff claimed certain Negroes under a late conveyance by his father, who, about 20 years ago,

conveyed them to the defendant's father, as he alleges, upon trust, who always afterwards kept them.

The counsel for the defendant argued, that the bill ought to be dismissed, for that the plaintiff states choses in action, and does not shew he gave a valuable consideration for them.

Taylor, Judge, allowed the objection to be good; but on the motion of the defendant, he permitted the father of the plaintiff, who was a defendant, to be made plaintiff, and put off the hearing to a future time, in order that the amendments might be made.

## Edenton, October Term, 1805,

### *Blount vs. Benbury;*

THE plaintiff offered a copy of a grant from the Secretary's office: it was not signed by the Governor.

Hall, Judge.—It cannot be received as the copy of a grant, but it may as a circumstance to shew that there was once a grant in existence.

*It was read.* The dispute concerned the title of land between two parallel lines:—The lower of them was said to be J. Blount's patent line; and if so, defendant was not in possession of plaintiff's land; but if the upper parallel line was J. Blount's patent line, then the defendant was in the possession of the plaintiff's land. The patent under which the defendant claimed, called for *Beasley's* line and J. Blount's line, S. 85 E. as one of the boundaries; and the grantor to Benbury, in 1783, called for J. Blount's line, and marked the line now contended for by the defendant, at the time of making his deed. One question was, whether the line thus marked, should be considered the line which the deed extended to; or whether J. Blount's line, wherever it might be, should be considered the boundary of the deed, notwithstanding the demarcation.

Hall, Judge. The act of limitation would make a title for the defendant, if the deed extended to the marked line—but I am of opinion it extended no further than to J. Blount's line, wherever that was. The demarcation is not an ascertainment of the line, which he meant as James Blount's line, called for in the deed; and of course the defendant has no colour of title to the land in dispute. Also, though the patent calls for *Beasley's* line, and the patentee's old line, S. 85 E. for one boundary, still the jury may consider *Beasley's* line the boundary, so far as it goes; and then the marked line, which is 51 poles to the north of it, and parallel to the line drawn from the termination of *Beasley's*, the same course with *Beasley's*, because there have been many

decisions in this country which warrant a departure from the line described in a deed or patent, to follow a marked line which the jury have good reason to believe was the true one.

Halifax, October Term, 1805.

*Hunter vs. Bynum.*

**T**HIS was an action to recover monies upon a race. The articles were executed the 21st of April, 1802. They specified the terms of the race, and the money betted, \$500; and the following points were now decided:—First; although there was no obligation distinct from the articles, yet the articles detailing all that could have been set forth in an obligation and articles, it was equivalent to the bond required by the act of 1800, ch. 21, which is in the following words: “No money shall be recovered at law by means of any bet or wager on a horse race, except a written obligation is produced on the trial, containing the sum so betted or laid on such horse race, signed, sealed and attested by at least one witness.” Secondly; the written contract cannot be varied or altered by parol testimony—but such testimony is admissible to prove the effect of the written contract, namely, that the plaintiff having run his horse on the day and place appointed, and the defendant having failed to appear and run his horse, that the plaintiff was thereby entitled to half the sum betted. The rules of racing were provable before the act, to shew that by such contract, the defendant under such circumstances, was liable to pay half, and so they are yet. Parol evidence was received and proved that such was the rule of racing, and there was a verdict for half the sum; otherwise, said the witness, would it have been, had there been a clause that the parties were to play or pay.

*Gee vs. Warwick & Co.*

**A**TACHMENT for a debt, and Mr. Hamlin was summoned as a garnishee. It was now objected that he ought not to be asked whether he owed as the executor of his father or grandfather.

*Hall, Judge.*—He cannot be interrogated in that character, unless the court can be convinced by further argument, that the case of *Welsh vs. Gurley*, decided not long since at Wilmington, is not law.

*Haywood and Plummer*, for the plaintiffs, forbore any such question; but they asked him, whether he did not owe as *heir* to his father or grandfather, and he answered; and his counsel,

Mr. Brown, did not object to the question—and he admitted a bond due from his grandfather, and that he had assets from him, not as heir, but as devisee.

*Harrison vs. Harrison.*

THE plaintiff sued for two Negroes, and called upon a witness to prove the detainer, who said he owned one of the Negroes descended from the wench, the defendant was sued for; and that if the defendant lost her, he, the witness, would lose his also.

Seawell insisted the witness could not be sworn if he conceived himself interested, and cited Stra. 129.

Hall, Judge.—The rule is, if the verdict in the present case cannot be given in evidence in the suit against the witness, he shall be deemed disinterested; and it is no exception to the rule that he conceives himself interested, when in reality he is not.

He was sworn, and proved the detainer, and the plaintiff had a verdict and judgment.

*Jackson vs. Anderson.*

THIS was an action to recover money won on a race. The articles were produced and proved, and the bond also; and that it was delivered as an escrow, to be delivered over to the winner.

Browne objected that the articles were for \$500, play or pay, and that the money should have been staked: and he proved by parol evidence, that according to the rules of racing, when a bet is made for a certain sum, and nothing more said, that the money must be staked.

HAYWOOD, *c. contra*.—The bond being of the same date with the articles, and for \$500, is to be considered with the articles, and to be explanatory of that of which the articles were silent; and taking them both together, the \$500 mentioned in the articles, were to be secured by bond, payable according to the event.

Browne answered, that the \$500 mentioned in the bond, were not the \$500 mentioned in the articles, unless parol testimony be admitted to prove that fact—and that such parol testimony could not be received, for that would be to explain words which in the articles signify the money was to be staked, to mean that it was not to be staked, but to be payable at a future time; and of this opinion was Judge Hall.

*Quere de hoc*: For the words of the act in the first section direct a bond to be given; and in the second section, 1800, ch. 21, sec. 2, directs “that all horse-racing contracts shall be reduced to writing, and signed by the parties thereto, at the time they

"are made, otherwise they shall be void, &c. and no parol testimony shall be admitted to alter or explain such contracts." Now how is the bond to be recovered on unless parol testimony be allowed to say it was given as an escrow to become his bond, to the obligee upon the event of his winning the race according to the terms specified in the articles? If you will not allow the subscribing witness to say this, then the obligee can never recover; for he cannot shew it ever became the bond of the obligor without shewing that he won the race; and he cannot shew that without referring to the articles and shewing that the race was run according to them, and that he was the successful party. The subscribing witness says, I subscribed as a witness, and saw the obligor subscribe his name; and I saw it delivered to B, a third person: This will not enable the plaintiff to recover, and the residue, which will, cannot be heard. Does not such a construction amount to a repeal of the act that allows of a recovery, and specifies the means? but by this determination the means are completely taken away.—The bond can never be established. I will here notice what appears to me to be another wrong decision upon this act; that the articles specifying the sum were equivalent to the bond required by the act, as in *Hunter and Bynum*. The act of Assembly clearly considered them as distinct; and their effects are certainly so. Had there been a bond in the case of *Hunter and Bynum*, how could there have been a recovery of one half of the sum? Can you give the plaintiff one half in an action of debt upon bond? Yet by dispensing with the bond, without which, says the act, *no money shall be recovered at law*, you let in the plaintiff to receive a different sum, and upon inferior testimony; for the bond is to be signed, sealed and delivered and attested by one witness; the articles are only to be written and signed.

### *Bryant and others vs. Deberry.*

**EJECTMENT.** Abraham Stephenson died in 1791, leaving a will, and therein he devised the lands in question to his son Charles for his life; and after his death to John, the son of Charles, and his heirs forever; *and if no heir*, then over to Abraham Darden and his heirs forever, &c. John died in the life time of the devisor, leaving two sisters of the whole blood, the plaintiffs. In the will there is a residuary clause, devising *all the rest and residue of his real and personal estate to Charles*. The plaintiffs contend that the devise over to Abraham Darden, is a void devise, being to take effect after failure of heirs of John; which event was too remote to expect, and made a *perpetuity*; and beside that the event had not taken place, for John did not die without heir, but had an heir, the two plaintiffs. And if the



limitation over was void, or could not take effect because the event had not happened, then the estate being undisposed of by the death of John in the life time of the devisor, that it went, under the residuary clause, to Charles, and from him descended to his heirs, the two plaintiffs; or if it did not pass by the residuary devise, then it descended on Charles, and on his death, to the plaintiffs. The event of John's death in the life of the devisee, would have let in the next limitation had it been a good one *in its creation*; but not being so, no *after event* can make it good; and for this he cited *Fearne*, 4th edition, 417, 438.

*Browne, e contra.* The meaning of the devisor is to be followed; and the word *heir* being in the singular number, meant *child*; and the phrase used is tantamount to saying if John died without a child, then over to Abraham Darden. He cited *Archer's case* in *Coke's Reports*: Also he said the expression was, *if no heir*, then over; which did not mean a dying without heirs indefinitely, but a dying without heir at the time of his death.

*Haywood* in reply. His meaning was that John and his posterity should have the estate as long as there was any, and when that failed that it should go over. If John had a child and died, and then that child had a child and died, and then the last child died without issue, it was the meaning of the testator that in such an event the estate should go over to Abraham; and such meaning is not agreeable to the rules for prevention of perpetuities, and concerning executory devises.

*Hall*, Judge, was of opinion for the plaintiff, and directed the jury to find for them, which they did; and there was judgment for the plaintiffs after a new trial had been moved for.

### *Brickell and Green vs. Jones.*

THE bill stated that Byrd was the administrator of his brother, and *they* his sureties in the administration bond. That he was afterwards appointed their guardian, and of course became entitled to receive whatever *he owed* as administrator, which by operation of law was a payment as administrator. That the defendant had sued for the children of the intestate, on the administration bond and recovered. The bill prayed an injunction. The answer was read and admitted the facts above stated; but insisted that the complainants, when defendants at law, had urged the same facts by way of defence, and as they had the benefit of such defence at law, they ought not again to urge the same in equity.

In support of the injunction it was argued by *Haywood*, that such facts amount to payment: and he cited *Salk.* 305, 326. *Cro. C.* 337. 1 *L. Ray.* 520. There, by the verdict at law, and judgment which proceeded upon a *mistake*, the defendants when they owed nothing and were legally discharged, have been una-

justly made liable to the payment of the sum stated in the complainants bill. They have been guilty of no default or omission; they are brought into these circumstances by the mistake of the court and jury. And as there is no court of errors, nor any other court in this state which has power to rescind this judgment, and to relieve the defendants at law by a revisal, this court ought to proceed rather upon the ground of mistake, as was done in 2 Washington, 273, 274, 275, or because after the judgment at law, the defendants at law became entitled to relief which no court of law could give.

*E contra*, it was argued, that to proceed here after a cause properly cognizable at law had been determined in a court of law, would convert this court into a court of appeals, and for matters of law into a court of errors, and in a short time all litigated causes will end here: whereas this court is for such extraordinary cases as courts of law are not competent to redress. The defence here was proper to be made, and could have been made with as much effect at law as in equity; and if either it was not made where it might have been, and was made and over-ruled, though improperly, this court ought not to interfere.

*Hall*, Judge, took time to consider; and after some days, determined that the facts disclosed in the bill might have been used by way of defence at law; and if used there and rejected as insufficient, there could not be relief in equity.

Carried to the Court of Conference.

### *Gee vs. Warwick, & Co.*

**A**NOTHER garnishee appeared, and a question arose, whether upon a bond of more than 20 years standing he could be asked, whether he had paid it or not. And the court, after consideration, determined that he could not; because that would be to make him give up a defence he would have if sued by the defendants: For if sued by them he might plead payment, and rely upon the lapse of time since the bond became payable. 'I think, said the Judge, he is entitled to the same benefit when called on as a garnishee. I cannot see why the defendants going away and subjecting the garnishee to be called on as such, ought to deprive him of any advantage he has. He was examined, and stated that the bond was given in the year 1774, payable on demand: He also stated the sum for which it was given, but the court would not suffer the question to be asked of him whether he had ever paid it.

*Blake Baker vs. Wilson Blount.*

**D**EBT upon a bond, to which one Adie was a subscribing witness. He was summoned to attend the last term as a witness, and did not do so; because, as he said, he was subpoenaed to attend as a witness at Fayetteville court, which sat on the same day as this court. Mr. Baker at the last term took a commission to take his testimony; and Mr. Jocelyn was appointed a commissioner. The witness does not attend now, and Mr. Jocelyn has certified, that he caused Adie to appear before him, and administered the oath of a witness to him, and that he would not answer the questions put to him; saying he had not his papers ready, and that it was improper to swear him by commission when he was at the same time under subpoena to attend in this suit. Baker moved for an attachment against him, and renewed the motion several times during this term; the court seeming to be in doubt whether an attachment was proper in the first instance, before a rule was served to shew cause why an attachment should not go; and the more so, as it might well be doubted whether upon the attachment the person attached was bailable. But at length it being stated to him, that in the year 1780, in this court, upon an indictment against Willison, a girl being recognized to appear, and having gone off when the jury were in part sworn, that Mr. Iredell, then Attorney General, moved for and obtained an attachment; upon which, Hatton, the person who carried off the girl, was taken up and bailed; and at the next term answered interrogatories. Judge Hall granted the attachment; but ordered an endorsement to be made, that Adie when taken upon it should be bailed.

The attachment issued accordingly.

*Alston vs. Sumner's heirs.*

**J**UDGMENT had been given against the executors, and a *sci. fa.* issued against the heirs, who pleaded assets in the hands of the executors. And now upon a motion for the collateral issue to be made up between the heirs and executors, Browne objected that the executors are not in court; for they were discharged on the finding that they had no assets in the suit against the executors.—And a *sci. fa.* must now issue to bring them in. Upon such finding, the judgment is *eat inde sine die*.

*E contra* it was argued by Haywood, That although such was the judgment at the common law, it was not so since the act of Assembly of 1784, ch. 11; for that directs a judgment to be entered for the sum due to the plaintiff, and to be paid either by the heirs or executors; by the former if they have assets and the executors none; by the latter if they have assets. The act

directs an issue to be made up upon the plea of the heir, that the executors have assets; which could not be but between parties in court. Again.—Such construction ought to be made as will oust delays and nugatory process; why dismiss the executor when he may still be wanting? If a *sci. fa.* is to issue after such plea of the heir, then one term must be lost, whilst we wait for the execution to come in, and perhaps more; whereas if he is continued in court ready to meet the heir when he comes in, the issue can be made up immediately, and will be tried as soon, or sooner than the process to bring in the executors can be returned. If the *sci. fa.* is to go against the executor, at the same time it issues against the heir, then you dismiss the executors, and at the same moment order process to bring them back, which is nugatory.

Hall, Judge, doubted, and gave no direct opinion—but Baker, for the plaintiff, ordered a *sci. fa.*

### *The assignees of Henry Baker vs. Pugh.*

**BAKER** was arrested on a *ca. sa.* and went to prison. Two days after, the defendant delivered a *fi. fa.* to the sheriff, who levied on the goods of Baker, and sold and satisfied the *fi. fa.* Afterwards, the two months expired from Baker's first arrest, and he was declared a bankrupt. It was proved on this trial, that about three months before the said arrest, he conveyed all his lands to Mr. Norfleet, to satisfy a debt he owed Norfleet; and the questions were two; whether he was a bankrupt from the time of the first arrest, or from the end of the two months; for if the latter, then the goods were sold by the sheriff before he became a bankrupt, and the assignees had no title. Secondly, whether the conveyance to Mr. Norfleet was a fraudulent conveyance. Thirdly; if so, whether the assignment related further back than to the act of bankruptcy upon which the commission issued. As to the first, the defendant's counsel cited 2 Burr. 818, to shew that the reason why it relates in England to the first arrest, is because the act of James I. expressly so directs, which our act omits. Secondly, they said it was immaterial whether the said conveyance were fraudulent or not, because the clause in the act of Congress concerning the assignment, makes the assignment good only as to all persons who claimed by or under any act done at the time or after the act of bankruptcy upon which the commission issued. But if it were necessary to consider whether fraudulent or not, they could readily shew from many cases, that a conveyance of part in satisfaction of one creditor, and when an act of bankruptcy was not in contemplation, was not a fraud.

Hall, Judge, adjourned the case to the Court of Conference.

*Bellamy vs. Ballard.*

**UPON** this bill filed for the purpose, the court being satisfied that the tenant for life, of Negroes, had threatened to remove them out of the state, and had given reasons to believe he intended to do so; did decree that he should give security not to remove them—and this decree was also extended to the stock, which was in like circumstances with the Negroes.

*Hightour vs. Rush.*

**THIS** was an injunction bill.—The process was not returned to this term, to which it was returnable; and no proof was made by the affidavit of Mr. Hightour, that he had delivered the process to be executed.

*Haywood* argued, that although an injunction might be dissolved for unnecessary delay, that here Mr. Seawell appeared for the defendant, for a dissolution of the injunction, which proved that they had notice of it; and although not seized with process, defendant might answer and dissolve the injunction if he could, upon the merits.

The injunction was dissolved, because it did not appear the complainant had endeavored to have the process served.

*Frohock vs. Edwards.*

**FROHOCK's** father purchased a tract of land from the defendant's father, upwards of thirty years ago, and paid for it, and continued in possession of the land till his death; and that possession has been continued by the plaintiff till the present time, but no deed was ever obtained from the vendor. This bill was for a deed to be made by Edwards, who was the devisee of all his father's lands. Edwards answered that he did not know of the contract, nor of the payment. The depositions proved the contract, the payment, and the acknowledgment of payment by the defendant. The court decreed a conveyance, but doubted as to the costs; whereupon were cited for the defendant, 2 Atk. 424. 3 Atk. 387.

*Hall*, Judge took time to consider; and after two or three days, directed the costs to be paid by the complainant. He said there had been a careless delay on the part of the complainant; and the defendant had a right to ascertain, by putting the complainant to prove whether there had been such a contract, and whether it had been executed on the side of complainant; he had

therefore done nothing amiss, and should not be compelled to pay the costs.

*Quere* if there was any necessity for putting him to such proof when the defendant, as was proved by the depositions, both knew of the contract and its execution. The decision has some semblance of support from the circumstance of his being a devisee. But I do not know that as to the payment of costs a devisee is as much favoured as an heir. And even as to heirs the reason why they shall not pay costs in England is because a wrong is there thought to be done them if the estate is separated from him who has a title, or is to support the honor of the family. Amb. 163. *It is a gratitude and duty due to the crown to leave an estate to go with the title. It is a dishonor to the crown and the public not to do so.* This reason governed in 1 P. W. 481. I make a doubt whether any such reason ought to prevail in this country under our present form of government. I do not however contest the propriety of the decision, it is conformable to British precedents. 3 Bro. Ch. C. 214. Amb. 163. 2 P. W. 283. 3 P. W. 371. 1 V. jun. 205. But I confess there is something in the reason of these cases which does not exactly correspond with the ideas which arise from the nature of our government, and from our present habits and modes of thinking. I cannot perceive why an heir should be more compassionated than the next of kin, whose expectations are defeated by some secret conveyance of the deceased, or by his will. I mean viewing him as an heir in this country.

*Thompson,*

vs.

*Allen's administrators and Peterson.*

THIS was an injunction bill, and Peterson was brought in by an amended bill. He claimed under the other defendant, and both defendants answered. And upon a question made on the dissolution of the injunction, whether each defendant should have costs—Judge Hall took time to consider, and after some days directed that each defendant should have costs.

*Farrell vs. Patteson.*

ACTION for money won upon a race.—And on the trial it appeared that Farrell was to run with some horse in the county of Franklin, and owned by persons in Franklin; the race was to be run on the seventh day of the month, and on that day the writ issued, as appeared by its endorsement. The horse which he ran over the ground was one in the county of Franklin, but one of his owners, there being two, resided in Franklin, the other in Warren.

*Et per curiam.* If the agreement be to run at A's quarter paths, the plaintiff need not prove he actually did run a quarter, but that he ran at such paths is enough; otherwise it is if the agreement be to run one quarter of a mile at such paths. If the writ be issued on the day of the race the plaintiff must prove it issued after the race. As to the owners of the horse, he ought to have been owned wholly by persons in the county of Franklin. Thirdly, if the articles are not *play or pay*, and defendant refused to run, the plaintiff is entitled to one half the sum betted.— But if the articles be *play or pay*, the plaintiff shall recover the whole sum betted. Fourthly, it ought to be proved that the plaintiff's horse carried through the paths the weights he received at the starting poles.

Wilmington, November, 1805.

*Williams's administrators vs. Bradley.*

**D**ETINUE for Negroes. Bradley obtained judgment against Williams in this court, in the life time of Williams. Execution issued from November, 1801, to May, 1802, returned *stayed*. Then it issued to November, 1802, returned *stayed*. Williams died, April, 1803: execution issued from May, 1803, to November, 1803, returned without indorsement or blank; then it issued to May, 1804, returned levied on three Negroes. A *venditioni exponas* issued to the sheriff then out of office, to sell, and he sold the Negroes in question to Bradley, who was the plaintiff in the execution.

Bloodworth, the sheriff, was offered as a witness, and received by Locke, Judge, on the ground that he was equally interested on both sides of the question; for if plaintiff recovered against Bradley, *Bradley would recover against the sheriff* for making an illegal sale. If the plaintiff failed, then he was liable to the plaintiff, for he had purchased lands of Williams, and had promised to discharge Bradley's execution.

Secondly; he decided that if a former sheriff seized lands to satisfy this execution, there being personal property, it is not a discharge of the execution as to the defendant, and the new sheriff may still seize personal property upon a new *fi. fa.* being delivered to him; and he ought to do so. Besides, Williams sold the lands to Bloodworth, in September, 1802, and consented, as Bloodworth swears, that Negroes should be considered as seized.

Thirdly; he decided that if a *fi. fa.* issues, it binds the property from the teste; and if a new execution be taken out within a year from the last return, though not from the last return.

term, but from the term next after that, it is a sufficient continuance of the execution, and will lay hold of the property of the defendant, though he dies between the return term and the next term, where there is a suspension of the execution. The authorities cited by defendant's counsel, were Salk. 322. 2 Ba. Ab. 352. 1 Cro. 174, 181. 2 L. Ray, 851. 2 Viner, 8, 2 Leon. 78. C. Lytt. 290, b. 2 L. Ray. 808.

Fourthly; a purchase of lands by the sheriff from the defendant, and a promise by the sheriff to apply the purchase money to the satisfaction of the execution, is not a discharge of the execution, but is an executory contract, which does not satisfy the execution till performed.

NOTE.—As to the third point, his honor said he was *clearly* of the opinion he delivered. The reporter thinks otherwise; it seems to him that the lien on the goods occasioned by a teste of the execution, continues till the return term of that execution, and no longer, unless continued from the last return term by a new execution, and so from term to term. 2 Leonard, 78. Comb. 346. 12 Mo. 377, speak in general terms, supposing the particulars to be understood: but their omissions are supplied by 2 Nels. Ab. 776, sec. 11. Gilb. on Executions, 14, 12 Mo. 84. 2 Barnes, 172, Law vs. Beat. 2 Inst. 471. Every case to be found of binding goods after the death of defendant, is where the execution by which they were bound, is teste before and returnable after the death: Such are 2 Vent. 208. 1 Mo. 188. Salk. 320. Comb. 33. Cro. El. 181. 1 L. Ray, 695. 3 P. W. 399: and the reason is, that the execution being regularly continued from term to term, the defendant's death must happen whilst some of them are out. There is not an adjudged case to be found where the point of decision was, that an execution teste after the death, bound the goods, because there had been an execution teste before the death. If the lien occasioned by the teste continues for a year without a new *fi. fa.* what is to become of purchasers who enquire of the sheriff and find no execution in his office, and who become purchasers after the return of the last execution, and within a year from thence? What is to become of the perishable goods of a defendant who dies, if they cannot be sold till a year and day from the return of the execution teste in his life time? According to the positions here made if the executor sells them, an execution may issue from the term following the death, or from any term within a year of the last return, and take them from the purchaser. If they will not keep but perish for want of a sale, the creditor is not liable for the value. As to 2 L. R. 851, see what is said, 2 Mod. 94. Salk. 87. 4 T. 368: Defendant gave a power of attorney to enter judgment, and died between Hilary and Easter terms, and the judgment was entered at Hilary term, and held good by relation. What is it to this purpose?



*Hooper vs. M'Kenzie.*

**L**OCKE, Judge. If A have a deed for one tract, also a deed for a second adjoining, and they are all comprehended together, and A is in possession for seven years of one and not of the others, the title to these others will not be aided by the act of limitations.

*Quere de hoc.*

*Jones vs. Bloodworth.*

**A** CERTIORARI was obtained, and an issue directed at a former term, to try whether the deed under which the defendant claimed the judgment obtained by Aun Jones, deceased, against the plaintiff, was bona fide. Jones, on the trial of this issue, now offered to give in evidence, a deed of a prior date to himself.

**Locke, Judge**—If this deed be genuine, it will not follow that Bloodworth's is not bona fide, unless it could be further shewn that Bloodworth knew of this deed when he obtained his. But as the issue made up does not embrace the plaintiff's case, he may pay all costs and have another issue made up.

**Haywood.** If we are to pay costs for an extraordinary issue made up by a Judge, which is not calculated to try the merits, we will not have an amendment upon such terms—we will proceed in the trial.

**Locke, Judge**—If you do go on with the cause, though the issue is immaterial, you shall not have a new issue after the trial, and I give you this warning of it.

**Haywood.** I shall, notwithstanding that warning, go on with the cause. The jury disagreed, and there was no motion made for a new issue.

**N. B.** As the writ of *certiorari* is of eminent use in our practice, it is much to be lamented that the rules concerning it are not steady. Some time past, a *certiorari* was brought to Hillsborough Superior Court, to remove a cause of Hanks' administrators against Hanks' executors. The *certiorari* was returned, and was argued before Judge Macay. He ordered the cause upon the trial docket; it stood there several terms; the parties on both sides summoned witnesses. The jury were impaanelled to try the cause; and upon an objection taken, that the record could not be found, the then presiding Judge dismissed the *certiorari*. Surely a cause standing on the trial docket, cannot be got clear of, but by trial, nonsuit or nonpros. and in the same manner when it comes up by *certiorari*, which is in place of an appeal, as when it comes up by appeal; and in case of appeal, the constant practice is to suggest diminution of the record, and to

send a *certiorari* for it; not dismiss the appeal. Besides, when a new trial is ordered in the court above, the former trial is set aside *ipso facto*. A dismissal of the *certiorari* will not restore the verdict below. What then will the parties do? The plaintiff below cannot take out execution.

### *King and wife vs. Worsley and others.*

THE plaintiff's wife, whilst a widow, dissented to her former husband's will, and now sued for a child's part: and the question was, as to an advancement made to one of the children, whether that should be estimated according to the present value, or as was the value when advanced. The advancement consisted of a wench and one child, but there are now seven children.

Locke, Judge, after argument. The advancement must be estimated according to the value when advanced.

### *Hunter vs. M'Auslan.*

HUNTER repaired the lighters of the defendant, and defendant drew an order for the amount on Gibbs and Barclay, who became bankrupts the day it was drawn. M'Auslan says he employed Gibbs & Barclay, and that they employed Hunter; that Hunter was their agent or servant, and that they were liable to him; and that this order was only to ascertain the amount, which they were to pay; and that there was no consideration, as between Hunter and defendant. Gibbs's deposition was offered to prove this statement; and it was objected that he is inadmissible; because if Hunter, in consequence of such evidence, should fail in this action, then Gibbs establishes a right in himself, to claim the money from M'Auslan; for the latter admits, it was since due to some one; and if not due to Hunter, it is so to Gibbs & Barclay. If paid by M'Auslan to Gibbs & Barclay already, then if Hunter recovers, M'Auslan will claim from Gibbs & Barclay what he has paid; and therefore, it is for the interest of Gibbs that Hunter should not recover. Suppose A and B make a race, and C is the stake holder, who admits the money is due to one of them; and A sues C; B is not admissible, because as the money is admitted to be due to A or B, it is due to B if A should be defeated. Such a verdict between A and C could not be given in evidence against B, yet B is rejected; which proves that a witness may be rejected, although the verdict to be procured by his evidence, could not be given in evidence for him, in another suit. 5 F. 578 is another instance; there the money was due from the acceptor, either to the endorsee or endorser; and the endorser was not admitted to prove the right to the money out of the endorsee.

*Ex. contra.* Gibbs proves he and Barclay owed and paid the money to Hunter. If Hunter should not recover against M'Auslan, then he will sue Gibbs and Barclay, and put Gibbs to prove as well as he can the payment which he speaks of in his deposition; and possibly, nay probably, Gibbs will not be able to prove it: Then Gibbs is interested that Hunter should recover in this action; for then he, Gibbs, will not be sued by Hunter. Should Hunter recover against M'Auslan, then it is said, he will sue Gibbs; then if Hunter fails, Gibbs will be sued; or if he succeed, Gibbs will be sued for the money now in controversy.—It is therefore immaterial to Gibbs whether he fail or succeed. But it is not true that Hunter's recovery will give M'Auslan an action against Gibbs; for if Hunter recovers, and M'Auslan then sues Gibbs, the latter may still say I had a right to receive the money, and am not bound by the verdict and judgment between Hunter and yourself. Gibbs therefore need not fear Hunter's recovery: he is interested that he should recover. For if he fails then Gibbs will be liable to his action: Gibbs therefore, when he swears to prevent Hunter's recovery, swears against his own interest. Also it is to be further considered, that Gibbs became a bankrupt, and has obtained his certificate; and there is no dividend, nor likely to be any: the whole of his effects have been taken to pay debts due to the United States, which have a preference, and there remains not a farthing for other creditors. Neither Hunter nor M'Auslan can sue Gibbs, because of his certificate; and if either of them sues the assignee, it cannot produce a diminution of the funds, because there are no funds: And besides, the assignees supposing they had a fund, would be liable exactly as Gibbs would be, laying the bankruptcy aside; namely, to Hunter if he fails in this action; and as they say to the action of M'Auslan, if he should recover. In either case a diminution to the same amount will take place, and therefore Gibbs is as much interested that Hunter should recover, as that he should not; and therefore is an admissible witness.

Look, Judge, after hearing several arguments. Had it not been for the bankruptcy, he would not be a good witness; because by defeating Hunter, he prevented a suit against himself, and retained in his hands what M'Auslan paid him: and because M'Auslan being originally liable either to Gibbs or Hunter, must remain so to Gibbs if Hunter fails in this action; for then no other person can claim but Gibbs. But Gibbs having obtained his certificate, and all his estate having been exhausted in paying the debts due from the United States, and there being no fund in the hands of the assignees to be diminished by M'Auslan's suit against them; it seems to me, there should be a new trial, that this part of the case may be better considered, and

that it may be so carefully determined, as to give satisfaction to the parties concerned.

A new trial ordered.

*The heirs of A. Toomer,*  
versus  
*The heirs of Henry Toomer.*

**T**HIS was a petition for the division of lands, under the act of 1787, ch. 17. It stated that Henry Toomer made his will in 1789, and devised to his son Anthony, father of the plaintiffs, an equal share of his estate with the defendants, who were also his children; that he afterwards acquired other real estates, and in 1799 died without making any will as to these; that soon after the date of the said will, Henry Toomer gave to his son Anthony, part of the real estate he had at the time of making the will; and the questions made by the petition were two. First; whether the lands so advanced were to be brought into hotch-pot, Secondly; whether, if brought in, they were to be valued as worth at the time of the gift, or of the death of the testator, or at the time when the division shall be made.

As to the first question, it was argued for the plaintiffs by *Haywood*, that the words providing for hotch-pot, in the act concerning the descent of real estates, 1784, ch. 22, sec. 2, were nearly the same as those used in the act for distribution of personal estates. They were of the same import, and for the same end and purpose; namely, to establish equality amongst the sharers.— But hotch-pot is not required under the act for distribution of personal estates, unless the case be such as is mentioned in the act; that is to say, a case of total intestacy. 3 P. W. 126, was thus: A by will bequeaths his estate in equal shares to his seven children; one dies in his lifetime, then the testator dies: the executors are decreed to be trustees; and as to the lapsed legacy, the question was, how a division should be made amongst the children; and whether four of them who had been advanced by the father in his life-time should bring into hotch-pot: And it was determined they should not; because this is a partial, not a total intestacy; and the act speaks of hotch-pot only in the case of the latter. Also, 2 P. W. 356, shews that hotch-pot does not take place, unless where the case comes directly within the act. An advancement by a mother who after dies intestate, shall not be brought into hotch-pot, because the act of distributions speaks of a division to be made amongst wife and children; and consequently relates only to the estates of such persons as could have a wife and children. To apply these cases to the present, the case now before the court is not one mentioned in the act, in

which hotch-pot is to be used; the case mentioned in the act is, where *one shall die intestate*—here he did not die *intestate*, for he left a will. As to the valuation in case the advancement is to be brought into hotch-pot; it has often been decided in the case of personals, and was so decided in this court the other day, that the valuation shall be as the advancement was worth at the time of the gift. I can see no reason why the realty should differ from the personalty in this respect.

*E contra:* It was argued by *Jocelyn* and *Gaston*, that hotch-pot existed at common law amongst coparceners; Co. Litt. 176; and therefore, in cases of division under the act, supposing hotch-pot not to be expressly provided for, it should nevertheless take place. But in truth the act operates upon every case where a part of the realty is left undisposed of; for then he is intestate as to that part; and all the same rules apply as in case of any other intestacy. Suppose a man makes his will of personalty, saying nothing of his realty; if it be not a case within the act, what goes with his lands? and if within the act for the purpose of division and descent, so is it also for the purpose of equality of division, which cannot be effected without hotch-pot. The case cited from 3 P. W. is where the advancement was before the will, and there hotch-pot would have been improper; because the parent by making a will and giving more to the advanced children than he had already *advanced*, manifested his intent to be, that they should have both the advancement and provision by will. In case of advancement after the will, the law perhaps would be otherwise. In that case also, there was not an intestacy as to the lapsed legacy; for it vested in the executor the whole personal estate vested in him, and therefore no part could be under the government of the act of distributions. But in the case before us the lands in question did not vest in any one appointed by the will of the owner, and therefore he did die intestate as to them; and they descend, not as formerly to the eldest son, but by force of the act, to all his children, and under the restrictions provided by it. As to the valuation, it should be as the advancement was worth at the time when the division shall be made. The rule for valuing real advancements, should differ from that of valuing personals, because personal estate is fluctuating and variable; that of the realty, permanent and stationary. A young Negro of small value may be given in advancement, and before the division, may be of great value: An old one may be advanced, and before the time of division, may be of no value at all. If in the case of realty, a valuation were to be made at any other period than that of the division, it might be, that a lot, value one dollar per acre, or £ 200, might be, at the time of division, worth £ 1000, or 5 dollars per acre. If valued at the time of the gift; in such case the advanced child would

have a share with the other children, and £ 800 besides; equality, the object of the act would be destroyed. As to improvements made by the advanced child, these should be deducted, and the value at the time of the division, exclusive of the improvements charged to him. If the advanced child has sold his advancement, he either will not be admitted into a division of the surplus; or if admitted, will be charged with the value he received, or that it was worth when sold, without the improvements. It is probable, however, he would not be admitted into a division; for nothing descends to an advanced child until he brings his advancement into the common stock; and this he cannot do where the lands are not his at the time of the division. Co. Litt. 176, speaks of bringing the land itself into hotch-pot; and expressly says, 179, it shall be valued as worth at the time of the division.

*Haywood, e. contra.* Had the act omitted the provision for hotch-pot, would Coke's chapter of parceners have been a sufficient provision for its introduction? If not, why talk of the law of coparceners? Why say it will take place in the case of a partial intestacy where it is not provided for, when it would not, in case of a total intestacy, had it not been provided for. The mode of valuation in the case of a gift in Frankmarriage, in Co. Litt. 179, if it be not owing to the nature of such gift, is certainly without any reasonable foundation; he does not make an allowance for improvements made by the donee. Whatever may be the law in the case of parceners, we are not bound to adopt the same rule of valuation under this act.—We had better resort to the same rule as used in other similar cases; such for instance as arise under the act of distributions. We ought not to make a difference between the valuation of real and personal advancements; unless for some urgent reason requiring a distinction. Reasons indeed for that difference have been offered. Personal property, it is said is fluctuating—real property is permanent.—I answer, the case now before the court, has come before it, because of the great increase in value of the property advanced.—Wilmington was burnt down a few years past; the land advanced, before of no value, was found to contain better clay for bricks, than could be found any where else; in consequence of such discovery its value rapidly increased. If a young Negro may grow up and his value increase, so may land, as in our case. If an old Negro may become older and of less value, so may a tobacco plantation, which the parent advances, wear out by cultivation; or pine lands where the trees are destroyed by getting turpentine, or cypress lands, which become of less value for every tree that is cut down and made into shingles. There is no reason for a difference. But if we had no guide on similar and prior determinations, we might readily perceive that the assump-

ment of value ought not to be made according to what the property was worth at the time of division. Suppose lands advanced, to be worth at the time of the gift, £ 1000 ; but before the division, by burning or decay of houses, fences or orchards, or by cutting fuel from off lands near the town, they become of £ 100 value ; if the advanced child account for £ 100 only in the division, then he has received £ 900 more than the other children : Or if he has cut down the timber and sold it for fuel, he has actually had the benefit of this £ 900. So also in the case of the tobacco plantation worn out by cultivation, he has actually received the £ 900 more than the other children. Will the court take all circumstances into consideration in order to effect equality, then they will make the advanced child account for the timber cut down, or the rents of the tobacco land exhausted :— If so, the child advanced is not the owner of the advanced property, but a lessee, accountable for the profits he receives. And how will we get at the circumstances which will enable us to attain this desired equality ? Must the advanced child prove the taxes he has paid, the sums expended in law suits for defence of his title, those he has given for extinguishing adverse claims, and whether it was prudent or not, in his circumstances, to pay for the extinguishment, and whether the sum paid was reasonable ? Must he prove that the houses were not burnt down by his neglect, or want of due care ; that they were not decayed, nor the fences nor orchards, for want of due care ? nor the rice lands grown up, nor the ditches filled up for want of care ? Must he prove that a sale was necessary, considering his circumstances, and unavoidable, and that he was not to blame for the existence of such circumstances ? If the doctrine advanced on the other side, be correct, the children are entitled to the increase of value ; and if so, they are entitled to that increase against the advanced child who has sold ; for their right to the increased value, can never depend upon his selling or not selling, especially if he sells voluntarily.

If all such circumstances are to be adverted to, a division will hardly ever take place until the estate is ruined by expences, litigation and delay. Children will never know their rights till a division is actually made, nor any lawyer be able to advise them. Fixing the valuation at the time of the death of the ancestor, is as much productive of inequality as fixing at the time of division : for lands of small value at the time of his death, may by discovery of mines or other advantages, rise to ten times the value before the division, as well as between the gift and the death of the testator ; and lands of £ 1000 value at his death, may by accident, become of £ 100 value by the time of division. It is best to consider the advanced child as owner from the time of the gift— if any loss happens by a diminution of value, it will

be his alone, and not the loss of his brothers and sisters equally with him: He, like other owners; will be interested in preserving his property; and like other owners, if an increase happens, he will be entitled to the benefit of it: he will be accountable for the value, which will be fixed and invariable, and not dependent upon a variation of circumstances which will continually change.—If a father has £.200 which he gives to his son to purchase land, and he purchases the same, and it rises to £.1000 value before the division, he will account only for £.260, because the money has not increased; but if the father pays £.200 himself to the debtor, and gives the land to his son, he will, according to what is now contended for, be accountable for £.1000. The circumstance of purchasing himself, or giving the money to the son to purchase, can never make such a substantial difference, if the rule of valuation be fixed on correct principles. That immaterial circumstance will make no difference at all, if the son be bound for the value he receives; for then, whether he receives in money or land, he will be chargeable precisely for the amount.

*Curia advocari.*

And at the end of the term, *Lockett*, Judge, delivered his opinion, and said the lands advanced must be brought into computation and valued as worth at the time of the gift; the lands to be divided, must be valued as worth at the time of the testator's death.

### *M'Kinzie vs. Smith.*

THIS was a bill in Equity for an injunction; and one question arising upon the bill and answer, was, whether as *Smith*, the executor of *Rowan*, whose daughter *M'Kinzie* married, had delivered over his share of the estate to *M'Kinzie* and had been since sued for debts of *Rowan*, which were recovered against him, was entitled to charge *M'Kinzie* with interest upon the value of the property so delivered over. *M'Kinzie* had given a bond to refund not exceeding the value he had received. *Smith*, in making up his account, had charged him with the value of the property delivered over, and the interest, and given him credit for the payments made by *M'Kinzie*, and the interest thereupon; and insisted, that if the balance was under or not exceeding the penalty of the bond, he had a right to issue his execution for the penalty dischargeable by such balance.

*Mr. Gaston* argued for *M'Kinzie*, that *Smith* was accountable to creditors for no more than the value of the property delivered over to a legatee.

*HAYWOOD*, *contra*, argued that *Rowan* died before 1789, and a delivery over before debts paid, was no legal administra-



tion—If he had kept the property, he would have been answerable for the value and interest, or the profits; and delivering over the property illegally, cannot surely exempt him from a burthen, which, but for that, he would have been subject to; nor take from the creditor his *interest*, which, but for that, he might have recovered. If the creditor can recover interest, then either Smith, the executor, or M<sup>c</sup>Kinzie, the legatee, must pay it: and surely the legatee who received the profits, ought to pay it rather than the executor, who gets nothing for the pains he has taken, but the trouble of this and other law suits.

*Locke*, Judge, however, was of a contrary opinion, and said he ought not to be charged with interest, for that he was not bound to refund exceeding the value he had received; and independent of that, an executor delivering over the property, was liable to creditors for the value, and no more.

N. B. In the suit of Hostler's executors *vs.* Smith, executor of Rowan, defendant, pleaded, that the property was delivered over in 1786, to M<sup>c</sup>Kinzie and others—and *Locke* decided that such delivery over did not amount to an administration; and the more so, as Smith had notice of Hostler's debt.

### *Andrews vs. Devane.*

**G**ASTON presented the affidavit of defendant, stating, that soon after he was served with the writ, he wrote to Mr. Jones, an attorney of this court, to plead for him; and rested under a belief that he had done so, until the present term; when looking upon the docket, he found a default entered: that he then went out of the court to employ Mr. Jocelyn; and before he returned, a jury had been sworn, and the damages assessed. He further set forth in his affidavit, *that he did not owe the plaintiff any thing.*

Mr. *Gaston* moved upon this affidavit, that the verdict might be set aside upon payment of costs, and the party let in to plead, so as to bring the merits in question.

*Jones*, *e contra*, opposed the motion with much earnestness.

*Locke*, Judge. It is agreeable to the practise to set aside the verdict, where the merits have not been tried, and that owing to mistake, provided it appears that the applicant probably has the merits on his side.

Let the verdict be set aside on payment of costs, and the party be admitted to plead.

*House vs. Bryant.*

**HAYWOOD** then stated, that in this suit he had been retained prior to the last term, by defendant, and had forgotten it, and suffered judgment by default at the last term: Since which, discovering his mistake, he had determined to move for leave to plead—but before he had done so, the jury had been empaneled in the cause; and it had not occurred to him that this was the cause he intended to move in, until after some evidence had been given to the jury. He further stated, that from the communications made to him by the defendant, he probably had a title to the Negro.

*Locke, Judge.* I cannot set aside the verdict on these facts.  
Motion refused.

*Court of Conference,*

Raleigh, December Term, 1805.

*Fryar's administrators vs. Blackmore's administrators.*

**FRYAR** sued Cannon by attachment, and ordered Blackmore to be summoned as a garnishee. Blackmore died, and his administrator was summoned and examined in court; and an issue was made up and a verdict given against him; thereupon he appealed, and security being not given in time, the superior court dismissed the appeal. He then moved for a *certiorari* and obtained it; and when the record was removed, it was insisted that a writ of error was the proper procedure; and upon that point it was moved to this court. And the court now decided unanimously, that a *certiorari* is the proper process to be used for obtaining relief in such a case.

*Trustees of the University vs. Foy.*

**THE** court now gave their opinions in this cause. *Locke, Judge.*—The Assembly cannot by passing an act of Assembly take away property from a private person, nor a common corporation, much less from the trustees of the University; that being established by the constitution itself, or what is the same thing, in pursuance of a direction in the constitution. I am therefore of opinion, that the repealing act, 1800, ch. 5, the object of which is to resume the escheated property granted to the trustees by the former acts, is repugnant to the constitution, and void.

*Macay, Judge.*—I am of the same opinion.

*Hall, Judge.* I concur with my brethren, that the Assembly have no power to take away the property of an individual or of a common corporation. But as the University is a public institution, I think, like all other public matters it is subject to the controul of the Legislature; and that the Assembly may assign more or less funds for its support at different times, as they may judge best for the public interest. I am of opinion therefore, that the repealing act is not unconstitutional.

*The heirs of Anthony Toomer*

vs.

*The heirs of Henry Toomer.*

THIS cause having been removed to the court of Conference, that court were now unanimously of opinion that the *advanced property* should be valued as worth when *advanced*; and that the property *to be divided*, should be valued as worth at the death of the testator; and also that the real estate acquired after the making of the will, should be divided under the act of 1784, observing the same rules with respect to hotch-pot, as if the ancestor had not left any will, but had died wholly intestate. See the statement of this case, Wilmington, November, 1805.

*Moreland vs. Moreland's executors:*

MORELAND, the testator, bequeathed the Negroes in question to his son Thomas *for life*, and after his death, to Francis, the son of Thomas, and his heirs; and *if he died without issue, to his brothers and sisters then living*. After several arguments at former terms of this court, the court now delivered their opinions

*Judge Taylor.* Brothers and sisters *then living*, means brothers and sisters *in being* at the time of making the will; not those who shall come into being afterwards. Moreover, the words *then living*, are used in other clauses of this will, where they evidently refer to the *death* of the legatee for life. That proves that in this place they have the same reference, that is to the *death* of Francis; not to the period when his issue shall fail. And in that view of the case which I think the proper one, the limitation over is not too remote, and is therefore a legal and valid limitation.

*Locke, Judge.* I am of the same opinion.

*McCay, Judge.* I am of the same opinion.

*Hall, Judge.* Brothers and sisters *then living*, means brothers and sisters who shall come into being, as well as those already in being, where they are to take on a future event; if to take a

present interest, they mean brothers and sisters in being—Cowp. 312. Consequently, as the brothers and sisters here spoken of, were to take on a future event, should it happen, all those born after the making of the will, who shall be living when the event occurs, have an equal claim with those in being when the will was made. As to the ulterior limitation to be good, it must be such *as must take effect, if at all, in a life in being, and 21 years after*. Now here suppose Francis died, leaving a son, and then Thomas had issue, another brother or sister of Francis; and twenty-two years after the death of Francis, his son should die without issue. Under the terms used in the limitation now under consideration, the issue of Thomas, born after the life time of Francis, would take, although the event upon which the ultimate limitation depended, did not take place till 22 years after the life of Francis, or it might have been 40 or 50 years after; for the issue born after the death of Francis, might have lived 50 or 60, or even 80 years; and the son of Francis, or the son of that son, might have then died without issue, 60 or 80 years after the death of Francis. A brother or sister of Francis might be then living, and might say, the estate is mine, for *I am a brother living at the period when Francis is dead, without issue*.—Whenever the issue of Francis fails, he is in law said to be dead without issue. This then is not such a limitation over as *must take effect, if at all, within a life in being, and 21 years after*: it may take effect if allowed to be a valid limitation, 50 or 60 years after that period—and I am therefore of opinion it is void in law.

The words *then living*, used in the other parts of the will, tie up the event to the death of the legatee for life, in precise terms; which proves that the writer of the will well knew how to confine the limitation over to that event when he wished to do so; and proves to my mind that he did not mean it in the present instance. He meant, as the words import, that the portion of Francis should go to all the children of Thomas, born and to be born, who should be living when the line of Francis failed. He had no reason for preferring the children of Thomas who were born, to those who were not so: he has not intimated such a preference.

*Queré* of this decision. I think for the reasons given and authorities cited by Judge Hall, that it is not law. Indeed I am satisfied it is not.

### *Howard vs. Person's administrators.*

A NEW trial had been moved for in Halifax Superior Court, but the motion and rule to shew cause, had not been entered of record by the clerk; and the Judge had mentioned to the counsel for the defendant, to cause an entry to be made by the

clerk, who was absent of the removal of the cause to the Court of Conference; all which had been neglected. And now the Court of Conference determined that the entry of the rule to shew cause why there should not be a new trial, should be entered by the clerk, *nunc pro tunc*; and that the next court should determine whether there should be a new trial or not.

## Circuit Court of the United States.

Raleigh, December, 1805.

### Teasdale vs. the administrators of Branton.

THERE was a verdict against the administrator upon the plea of fully administered.—Judgments, &c. Execution issued, and was returned *nulla bona*. This *sci. fa.* issued to shew cause why the plaintiff should not have judgment to be levied *de bonis propriis*. The defendant pleaded *nul tiel* record, no *devastavit* returned or found.—Judgments. Replication to the plea of *nul tiel* record, and demurrer to the other pleas. The record produced shewed the verdict, no judgment had been regularly entered. The *sci. fa.* after stating the verdict, went on and stated that judgment was rendered accordingly

*Per curiam.* We must presume according to the loose practice of this state, that there was a judgment entered pursuant to the verdict, and therefore we must say there is such a record.—As to the demurrer, for that no *devastavit* is returned or found: so be sure by the English practice, no *sci. fa.* lies against the executor, to subject him *de bonis propriis*, till a *devastavit* is found upon a *scire fieri* enquiry, and returned. An action of debt, however, will lie upon suggestion of a *devastavit*, and the practice in this state has been to issue a *sci. fa.* upon such suggestion. And as every defence can be made to the *sci. fa.* which could be made to the action, there can be no good reason for adjudging the *sci. fa.* improper. If the *sci. fa.* here be considered in lieu of *scire fieri* enquiry in England, it possesses advantages far above the English mode; for here it is to be executed in court, and under the direction of the court; whereas the other is in the county before a jury. With respect to the demurrer to the plea of judgments and no assets *ultra*, that was pleaded in the original suit; but the defendants counsel say a replication thereto, denying the judgments, is *nul tiel* record; and the record shews that the jury said there were no such judgments: therefore the plea has not been tried, and if so, no judgment can be presumed; for the court ought not to enter judgment when any one plea remains untried. The answer is, the

replication may be either *nul tiel* record, or assets *ultra*, or ~~per~~ *fraudom*, or *oether* matter of fact; and such replications was properly triable by jury: and an irregularity committed by the clerk in entering the verdict, will not raise a presumption that the judgment was not given upon the verdict. If there was such a judgment, that estops the defendant from using any plea which he did or might have pleaded prior to that judgment. The demurrer therefore must be allowed.

*Anonymous.*

**PER CURIAM.** This is a *sci. fa.* against bail; and the plaintiff's counsel urges that he is entitled, against the bail, to *interest* upon the judgment against the principal. We are of opinion he is not so entitled; for the judgment upon the *sci. fa.* is that the plaintiff have execution against the bail, of the judgment against the principal. The very same execution therefore issues against the bail as issues against the principal; and consequently damages arising after the judgment cannot be included. *Caseo* cited, Salk. 208—Stra. 807, 807—2 L. Ray. 1532—C. Digest Bail—R. 10.

*Grubb's administrator vs. Clayton's executor.*

**PER CURIAM.** This cause was instituted formerly in Wilmington Superior Court. The act of 1715 was pleaded, and thereupon a case was made and stated for the Court of Conference, who decided that the said act of 1715, ch. 48, sec. 9, was in force. The plaintiff's counsel then replied to the plea; and after the replication, the whole bill was dismissed on their motion, that is to say, on the motion of the plaintiff's counsel. The suit was then instituted in this court, and the defendants counsel have pleaded the former dismissal in bar. We are of opinion that was not a dismissal *upon the merits*, considered of and decided by the court, and therefore that the plea in bar is not good. There is also another plea in bar; namely, the act of 1789, ch. 23, sec. 4; by which it appears that this suit was not commenced within three years from the qualification of the executors, though there was an administrator of Grubb in England. Now as there was no administrator in this country, there was no person in being who could demand the debt, of course no creditor to be barred. The words of the act are, "the creditors of any person deceased, if they reside without the limits of this state, shall within three years from the qualification of the executor or administrator, exhibit and make demand, &c.—and if any creditor shall hereafter fail to demand and bring suit for the recovery, &c. he shall forever be debarred," &c. The

plaintiff, therefore, is not within the body of the act. We need not consider whether an exception shall be allowed of, which is not expressly mentioned in the act.

*The United States vs. Holtsclaw.*

**P**ER Curiam. The objection made by Mr. Seawell, that no one shall speak as to the hand writing of the president and cashier of the bank, but one who has seen them write, or has been in the habit of receiving letters from them in a course of correspondence, is not a sound one. These signatures are known to the public, and persons who have been in the habit of distinguishing the genuine from the counterfeit signature, and conversant in dealings for bank bills, are as well qualified to determine of their genuineness, as persons who in private correspondence have received letters from the person whose hand-writing is in question. Moreover, it is determined by the skilful whether a bill be genuine, not only by the signature, but also by the face of the bill, and by the exact conformity of the devices which are used for the detection of counterfeits, to those in true bills. We are of opinion that the judgment of persons well acquainted with bank paper, is sufficient evidence to determine whether the ~~same~~ question be genuine or otherwise.

Newbern, January Term, 1806.

*Pearse vs. Templeton.*

**D**EBT upon a bond, with condition, stating that defendant had sold several warrants to the plaintiff; and that if any of them were bad, that the defendant, on request, would give credit on the note which Pearse had given for the consideration money, to the amount of the value, &c. The pleas were conditions performed and *non est factum*. The bond was proved; and the plaintiff further proved, that he had caused a survey to be made, pursuant to one of the warrants, No. 190, and had obtained a patent for 640 acres; and he stated, that of two hundred acres, part of the 640, one Joseph Pearse was in possession; that the plaintiff had sued him for the two hundred acres, in an action of ejectment, and that there was a verdict against him for the plaintiff. He offered the record of the ejectment to prove this. And it was objected by Harris, for the defendant, that Templeton was no party to that ejectment, and that it ought not to be read against him.

*E contra*, it was argued that it ought to be read as *prima facie* evidence of title in the defendant in that action, leaving it to

Templeton to shew, if he could, that the verdict was by *Covin*, or that the title was not in Joseph Pearse—and the counsel cited 1 Wash. 306 to 308,

*Hall*, Judge.—The record ought to be read, but can prove no more than that the plaintiff did not recover. It will not be of itself, proof that Joseph Pearse had title.

The record was read, and Judge *Hall* directed the jury that the plaintiff should have proved Joseph Pearse's title; and that he had not done so, for the record was not evidence of that; and the plaintiff hearing the opinion of the court, suffered

A nonsuit.

### *Bryant vs. Parsons.*

**EJECTMENT.** On the trial the plaintiff offered to give in evidence the registered copy of a deed to the person under whom he claimed. The dispute depended upon a line being either N. 5 E. or 45 E. If the former, the land in controversy belonged to the plaintiff; if the latter, to the defendant.

The counsel for Parsons objected that the copy could not be read upon the affidavit of the plaintiff: that he had not the original, nor could command it, if the defendant could prove that he, the plaintiff, had caused or been privy to its destruction.

The court permitted the defendant to introduce witnesses, who swore to conversations of the plaintiff in substance amounting to this: "That he had not possession of the deed, nor had ever seen it since a former trial in this court; but that it was where it never would be seen again; that they were fools for producing it at first; that he believed John Hill Bryant, (who claimed a part of the land under the same deed) had it since the trial, and he supposed the deed was burnt." They proved further, that the deed was altered in the place describing the course, and that it had been in the possession of John H. Bryant. The plaintiffs proved that the alteration in the deed was from No. 5 to No. 45, and against his interest—of course that it would be for his advantage to produce it, as it would shew what was the course originally, which had been altered; and consequently that the plaintiffs probably did not alter it. The plaintiff swore he had not been privy to its destruction, nor knew where it was. The plaintiff's counsel urged the court to admit the copy they offered, and to submit to the jury to decide whether the deed was destroyed by the plaintiff—and if so, to pay no regard to the copy: and they urged it the more, as they alleged, because as to the point whether destroyed or not, there was evidence on both sides, which it was the proper province of a jury to decide upon.

*Hall*, Judge. The court must determine it, in order to de-



side upon the admissibility of the evidence offered, and will decide it as a jury would. If setting as a juror, I should be obliged to say upon such evidence, that the plaintiff was privy to the destruction of the deed. The copy under such circumstances, cannot be admitted.

Referred to the Supreme Court.

### *Steele vs. Hatch.*

**S**TEELE claimed the disputed part, under an old grant made to his father, who had sold all of it but the disputed part. The defendant claimed first under a grant of a latter deed, for 85 acres, including the whole of the disputed part;—also under a grant of 200 acres, including part of the disputed tract. He proved possession of part of the disputed tract for 30 years; but the part so possessed, was a part of the 200 acres; which 200 acres had been sold to Hatch by the father of the plaintiff, under whom the plaintiff claimed the disputed part.

*Hall, Judge.* This possession will not avail the defendant; for though it is a part of the land included in the first patent, it is also a part of the land included in the second patent, and also a part of the two hundred acres. It gives possession only of the 200 acre tract, not of the land included in the 85 acres; because being sold as a part of the 200 acres by P. Steele, the father who owned the said remnant, he was thereby divested of so much of the said remnant as was included in the 200 acres, and could not sue for it, nor could the plaintiff claiming under him. The possession was not of any land which belonged to the plaintiff—nor did such possession call upon him to assert his claim to the residue of the remnant not included in the said 200 acres, by entry or otherwise.

### *Murphy vs. Guion's executors.*

**T**HIS was an action of trespass to recover mesne profits.—Murphy had sued in ejectment and recovered; but at the time of the judgment, the demise laid in the declaration, had been for some time expired. Murphy had gotten possession, and brought this action. The defendant pleaded *liberum tenementum*; and the plaintiff replied, the action of ejectment and the recovery therein; and the defendant demurred.

*Hall, Judge.* We must suppose the court entered the proper judgment, and it was not for the recovery of the term, but for the damages. 2 Burr. 668, proves that the defendant in ejectment, is not concluded or estopped, but where the judgment is for the term unexpired, which draws to it the possession. That possession when obtained under the judgment, enures

according to the right which the plaintiff has, and gives him possession of such estate as he has in the lands, whether in fee, for life, or otherwise. Here it was not determined that the plaintiff in the ejectment had any title; and therefore the judgment does not estop the defendant to say he had none, nor to say that he, the defendant, had not the freehold when his possession commenced and was continued.

*Sheppard and others vs. Sheppard, widow.*

THE plaintiffs, as heirs at law of their ancestor, sued the defendant as tenant in dower, for waste done on about 40 acres, part of her dower lands. And the jury found that waste was done as they had declared, and assessed damages to six pence. Whereupon it was moved in arrest of judgment, that where such small damages were assessed, the court could not consider it as such waste for which an action would lie. And the defendant's counsel stated the law to be, that the court could not adjudge any destruction to be legally a waste, unless it amounted to something considerable: and he cited 2 Bos. & Pull. 86, and the cases there cited, viz. Fitz. Ab. Waste, p. 111, 123. Co. Litt. 54 a. 2 Inst. 306. Cro. C. 414, 452. Finch Law, Lib. 1, ch. 3, sec. 34. 3 Bl. C. 228. Viner Ab. Title Waste n. B. & N. P. 120.

Hall, Judge, (after taking till the last day of the term to consider of the authorities.) The authorities cited are strong to the point for which they were cited, nor did he conceive them unreasonable. Where waste of insignificant value is done scattered through a whole tract, the tenant must lose the place wasted; and this is too heavy a penalty where the damage is to the amount only of a small sum. That ought only to be considered waste which is substantially an injury to the inheritance.

Judgment arrested.

*Smith vs. Auldridge.*

IN May, 1795, Auldridge purchased a tract of land from Turner, running to a corner, and from thence south 50, E. down the creek to a white oak, at the mouth of a branch: thence, &c. Turner afterwards sold to Smith the land between the creek and the said line, south 50, E. not saying down the creek. Auldridge got possession of the land between the creek and this line, saying the creek was the boundary of his land, as well as of the patent under which he claimed; and Smith sued him in this action of ejectment. Hall, Judge, charged that the creek was the boundary, and included within the bounds of Auldridge's deed the land in controversy. Smith proved on the trial many admini-

son of Aldridge, after his purchase, that the said line, south 50, E. was his boundary; and many offers on his part to purchase the land between that and the creek. Upon this evidence after a verdict for the defendant, Smith filed his bill, stating a mistake in drawing the deed, and that the said line was the line shewn to him at the time of the purchase, and understood it to be the line purchased to. It prayed an injunction against the costs of the action in ejectment, until the court of equity should make further order upon this bill:

*Hall, Judge, (after argument.)* The plaintiff knew of Aldridge's claim, and has taken a wrong mode of obtaining redress. He should not have brought an ejectment. The costs have accrued in consequence of this wrong step, which is imputable to him. It is said the defendant was wrong in setting up a defence for the lands claimed by the plaintiff, as he knew he, the defendant, had not purchased them. The plaintiff however had every reason to believe he would set it up, because he had taken possession and kept it. The first departure from correctness was on the part of the plaintiff in this bill, and therefore I will not screen him by an injunction, from the costs incurred thereby.

*Injunction refused.*

### *Tooley's executors vs. Jasper's administrators.*

**T**OOLEY sued his father in law J. Tooley, for certain Negroes alleged to have been given by the defendant, to his daughter, the plaintiff's wife, and afterwards detained by the father. Whilst this suit depended, Jasper entered into a written agreement to pay all the costs of it, should it prove unsuccessful: and Tooley, the plaintiff at law, gave a bond in the penal sum of £.500, with condition to deliver to him one half of the Negroes recovered, should a recovery be effected. The Negroes were recovered, and the half of them were estimated at upwards of £.700. Jasper's administrators brought an action of covenant on the condition of the bond; which action, by the opinion of Judge Taylor, was held to be maintainable, notwithstanding an objection taken thereto, that covenant would not lie on the condition of a bond. In consequence of this opinion, the cause remained on the docket, and went to trial at an after term—and the jury assessed damages for the value of one half of the Negroes as before stated. Whereupon, the executors of Tooley filed this bill in equity, stating that the said Jasper had not been at any expence; that he had given no consideration, and that he had not given an adequate consideration; that the bargain was unconscionable, and that it was founded in maintenance and champerty. The answer stated, that he had expended large

sums of money, but did not particularize any. After a lengthy argument on both sides,

Judge *Hull* said, it seemed to him the answer should have stated the sums advanced; that the court might judge from thence whether the consideration were adequate or unconscionable; and he refused to dissolve the injunction. The authorities cited for the complainant, were 2 C. Digest, Chancery 4. D. 3, 4 D. 4, 4 D. 5, 4 D. 7, 4 D. 10. 4 edition, page 665, 666, 668, 669.

*Commissioners of Greene County*  
versus  
*Holliday's executors.*

THE Assembly laid a tax for two years, to be collected, each tax the year following that in which it was laid. Holliday was appointed sheriff in the first collection year, and received part of the taxes: he was appointed also for the second; but the time of payment of the tax had not arrived. Sheppard, who had undertaken the erection of the public buildings, applied for money, and the commissioners drew on the sheriff, directing him to pay to Sheppard *the taxes collected or to be collected*. Under this order, Holliday paid the taxes for both years. The commissioners alledge that the words, *to be collected*, referred to the taxes then *payable*, and not collected, and did not extend to the taxes of the second year. The counsel for the commissioners offered to give parol evidence that such was the meaning of the order; and he relied upon Peake's evidence, page 77, 78, where it is said, an ambiguity, either latent or patent, may be explained by parol, where the thing which is the subject of the writing, would pass without deed; and that is the present case; for a verbal order would have been of as much efficacy as this written one.

*Hall*, Judge. Whether the passage referred to, be correct or not, I conceive the evidence offered cannot be received; for Holliday had not any knowledge of the contract between the commissioners and Sheppard, except what he derived from the inspection of the order. If the evidence be good to explain what the parties meant, as between themselves, it cannot be so as to third persons, who have governed themselves by the words used in the writing.

*Fanny Ray vs. Mariner and wife.*

**T**HIS was an issue of *devisavit vel non*, made up under the direction of the court; and these points were determined by the court.

Mr. Browne stated, that a will dated the 12th of February, 1784, was proved in the county court; and that the paper now offered was dated on the 14th; and he wished to exhibit a copy of the one proved, to shew some sentences that were contained therein, and how different the dispositions were from those pretended to have been made two days after.

Taylor, Judge. This will being proved cannot be given in evidence but by an attested copy, not by a sworn copy; not because an attested copy cannot be dispensed with where a sworn copy can be proved, but because in the case of a will, the probate is the only regular proof.

The defendants offered a witness, to whom it was objected by the plaintiff's counsel, that he was interested; and that they would prove the interest: upon enquiry, however, the witness to prove the interest, was absent. They then proposed to examine him on the *voir dire*; and it was said by the plaintiffs they could not now examine upon the *voir dire*.

Taylor, Judge. The rule certainly is, that when witnesses are examined to prove an interest in one who is offered as a witness, and fail in doing it, that the person offered cannot be examined in the *voir dire*: He cited 10 Mod. 193. But he said, no witness had been examined to prove the interest in the present case; and therefore that the person offered as a witness might be examined on the *voir dire*.

*Hamilton vs. Benbury:*

**T**HE plaintiff had a bond given by the defendant; and also an account against him: he drew an order on the defendant for a small sum of money, which he paid without directing whether it should be carried to the credit of the bond or of the account: and Hamilton now applied it to the account.

*Per curiam.* The plaintiff may apply the payment *at law*, if the defendant fails to do it.

*Wiggins vs. Tatom.*

**T**ATOM owned a ship, and took on board, to be carried to New-York; 640 bushels of pease, for the plaintiff, some for R. Armstead, and some for John Armstead. The vessel ran aground and was in danger of perishing, when all the pease but 176 bushels were thrown over board to lighten the vessel. This

action at law being an action on the case, was brought against Tatom by the plaintiff, to recover from Tatom his proportion of the loss.

*Per curiam.* I will not proceed till you satisfy me that an action at law is the proper remedy to be pursued—I think it is not. The plaintiff's counsel cited, but did not produce, 1 East's Reports, 220; and the Judge said he would have the plaintiff called, and would set aside the nonsuit, if the plaintiff's counsel would convince him that it was wrong.

The plaintiff was nonsuited; but the Reporter having left the court before the end of the term, cannot say whether the nonsuit was set aside or not.

*Vide* 2 Bos. & Pull. 268, 274, which supports the position, that the suit may be at law.

### *Pearse and others vs. House.*

**EJECTMENT.** In the year 1751, John Harrell conveyed to his four sons, Esaias, Ezekiel, David and Josiah, 640 acres of land, called the Runnery Marshes, in the county of Bertie; 160 to each by a deed in the following words, to wit: 'Know all men by these presents, that I, John Harrell, senior, of Bertie county, for the love and good will I have unto my four sons, David Harrell, and Esias Harrell, and Josiah Harrell, and Ezekiel Harrell, do give, grant, and confirm unto them my four sons above mentioned, one certain tract of land and plantation, situate, lying and being in Bertie county, and in a place commonly known and called by the name of Runnery Marshes, containing by estimation, six hundred and forty acres of land, and plantation; which land and plantation I give and grant unto them my four sons above mentioned, unto them and unto their lawful heirs lawfully begotten of their body or bodies: and I lend unto all these my sons' wives, that now is my sons' wives above mentioned, or hereafter is these my sons' wives above named, that is, David, Esias, Josiah and Ezekiel, each woman the use of what land I gave her husband; to have and to hold, possess and enjoy peaceably and quietly without any interruption by or from any of my family; that they may peaceably enjoy what part of the land belonged to their own husband during their natural life or widowhood; and after her or their deceases or marriage, for want of such heirs as above mentioned, that part of the land to be sold to them, one or more of my sons that is then living, or their lawful heirs of their own body or bodies, as shall give most for the piece of land and plantation; and they that are then living, of these my sons above mentioned, or for want of them, any one or more of their lawful heirs of their bodies, may execute a deed of sale for

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the land and plantation in some court of record held for the county; the sale shall be deemed good in law. And likewise, if any one or more of my sons above mentioned is willing to sell their part of the land that I gave them, and will sell their part of the land so given by me, to any one or more of their brother or brothers, his conveyance recorded in court, shall be deemed good and sufficient in law, as if it had been their own purchase; which land, already laid off by lines of marked trees to every and each of my sons as above named: And I do by force and virtue of these presents, give, grant and possess them my four sons and their wives with the above said land and premises; to have and to hold the said land and plantations, with all privileges therein or thereto belonging, or any wise appertaining thereunto, excepting of our privileges, that is, me myself and their own mother, to either land range or timber, for our own use, during our natural lives: and as to what cypress timber there is on or upon the said tract of land, they four have and take and make use of each and every one as they have occasion, for their own houses, or other house ware, or flats or canoes, or what other use they may or shall have occasion thereof: and I do hereby force and virtue of these presents, give, grant, alien and convey all and singular my right and title of the above demised land and premises unto the said David Harrel, and Esias Harrel, and Josiah Harrell, and Ezekiel Harrell, unto them and their heirs above mentioned forever, observing the rights and privileges above mentioned to myself and their mother and their wives during their natural lives or widowhood as above said. One hundred and sixty acres of land and plantation, be the same more or according unto the bounds already marked by me, each of them my sons, one hundred and sixty acres land and plantation as above said; and if any one or more of them should die without such heirs as above said, their part of the land to be sold to any one or more of them my four sons here above mentioned; and the money to be equally divided amongst them that are living, of them four above mentioned:—And I likewise give and grant unto my son Israel Harrel, the plantation whereon I now live, and all the land adjoining thereunto, after my decease and the decease of his mother; and unto him and his heirs forever, three hundred acres of land and plantation, be the same more or less, according to the bounds already made by me. In witness whereof, I have hereunto set my hand & fixed my seal, this 13th of May, 1751.

JOHN HARRELL. (Seal).

Signed, sealed and delivered }  
in presence of }

I likewise give unto my two sons, Ezekiel Harrell and Israel

‘Hardy Harrell, one hundred acres of land nigh the head of  
 ‘Jumping Run: fifty acres a piece after our decease, to them  
 ‘and their heirs forever.  
 J. HARRELL.”

At May term of the county court of Bertie, 1751, John Harrell, in open court, acknowledged this deed; and it was ordered to be registered, and it was registered.

Esias died before the year 1758, leaving a son, Esias, who died an infant and without issue; and also a daughter, Sarah, who married the defendant, and died without issue in the year 1772; at which time, Ezekiel and David were also dead, and none of the grantees were alive except Josiah, who died in 1773. He commenced an action of ejectment in 1772, in the month of October, which abated by his death. He left femal issue married at the time of his death, who died married, leaving some of the plaintiffs infants of tender years, who did not arrive at the age of twenty-one years till within three years next before the commencement of this action. Noah, a son of David, one of the grantees, commenced an action of ejectment for the same lands, or some part thereof, in 1782, and was non-suited not long afterwards.

*Browne and Woods* for the plaintiffs. The intention of this deed is to give the land to those of the grantees who should be surviving on the failure of the issue of any of the four sons; and Josiah answers that description. A grant of the profits of lands vests the lands themselves in the grantee: So does a grant of the monies to be produced by a sale of lands where the monies are to belong to one person.

The act of limitations will not bar his issue, because he commenced an action immediately after the death of Sarah; and tho’ it abated and was not revived, yet we have a good excuse for not reviving. Those on whom the title descended, on the death of Josiah, were under disabilities from the time of his death, till lately. And moreover, the defendant, House, purchased of George, the heir at law of the grantor, who had not any title; and the defendant knew when he purchased from him that he had not; and such a purchase with a deed under it, cannot make a colour of title. It is like Farmer’s case in 3 Coke’s Rep. 77.

*Haywood*, for the defendant. There is no estate tail created by this deed: the words empowering each of the sons to sell, are incompatible with an estate tail; and they are not to be rejected for repugnance, because they do not *diminish* the quantum of estate given before to the grantee, but enlarge it. Like an estate for life to the grantee, *hobendum* to his heirs. If it were to his heirs *hobendum* for life, the latter would be rejectable, because against the estate before granted, and to the prejudice of grantee; whereas those words are to be adhered to which are most favorable to the grantee. If the words in question be not reject-



able, then those which make the estate inheritable are to be preserved, and those which would create an estate unknown to the law, rejected; like a limitation to one and his heirs male, an estate cannot by the rules of law descend to heirs male; but here it was meant that the estate should be inheritable; and as it cannot be inherited as the grantor has mentioned, the part repugnant to law shall be rejected, which is the word *males*; and the rest shall stand, which makes a fee. So here the estate is intended to be an inheritable one, and alienable; and it cannot be both, if the words of *the body* be retained; therefore they shall be rejected, and then the estate will be a fee. The consequence is, there can be no such remainder as the plaintiffs claim. But if this be an estate tail, then what is the limitation over? It is either a *power to sell* or a *remainder*. Consider the limitation over as a remainder, it must be a contingent one; for in the contemplation of the grantor, the grantee might sell and destroy it; the estate tail might last till after the death of all the grantees; all or some, or one only, might be alive at the determination of the estate tail; it could not be known till that period arrived, which of the sons, if any, would be entitled; the land is to go to him or them who would *give most*. If it was a contingent and not a vested remainder, then it was not connected with the estate tail, so as to take effect *eo instanti*; that it determined for that one of his sons who would give most could not be known till the sale took place, after the determination of the estate tail; and that point time, if separated for one day or one week from the instant of the determination of the estate tail, might be separated for twenty years; for so long the sale might be delayed. And shall the freehold be so long in abeyance? when the law will not allow it to be in abeyance at all? They say *events* have happened which do connect it; for that Josiah was the person entitled, and was ready to take on the determination of the estate tail. Admit this for argument sake: can a subsequent *event* make good a limitation void in its creation? If the fee was to vest in the purchaser, then he could not be known till after the determination of the precedent estate. If it was to vest in such of the sons as were to be entitled to the money raised by a sale of the lands, then Josiah was the surviving son entitled to the money, and of course, according to this position, to the land; and so the fee vested in him *eo instanti*, that Sarah's estate tail ended. How is it proved that those who were by the deed entitled to the money the land was to be sold for, were entitled to the land itself? It is proved, say our opponents, by this, that a grant of the *profits* of land, is a grant of the land. I admit it; but why is it so? Because if A is to take the profits he must have the land to take them from. This forbids the idea of the lands going into other hands; but if he is to take the *money produced by*

a sale, the lands must go from him, must be alienated to produce the money: the foundation of the cases is not the same, but dissimilar in every thing. Admit however, that Josiah, because he was entitled to the money, was also entitled to the land, which was to be sold to raise the money. Then the act of limitations began to run upon him, from the day of death of Sarah, in 1772; and it is a rule too well established to need any giving the reasons for it, that if the act once begins to run, it shall run on notwithstanding any subsequent disability. This has been considered as settled law ever since the time of Plowden, who reports this point to have been decided in the case of *Stowell vs. Louch*, 1 vol. 355. Then taking this rule for our guide, the act of limitations will bar the title of Josiah and of those claiming under him, unless an entry were made within seven years from the death of Sarah. It is said an action was commenced by Josiah, in October, 1772, and abated by his death; that, they say, is equal to a claim, and that a claim is equal to an entry.— An action however is only tantamount to a claim, when it is proceeded on to judgment without any neglect on the part of the plaintiff, C. Litt. 163, a. If an action be commenced, and determined by the death of the plaintiff, and be again re-continued, it shall, as to the act of limitations, be considered as commenced from the time of the first action; but if the second action be commenced above a year from the determination of the first, then the computation as to the act of limitations, shall be suspended only from the commencement of the latter action; and the act shall run on and be computed up to that time, and the first action shall be considered as a mere nullity. They say, however, they have an excuse for not re-commencing the action in time; they were under coverture and infancy. I answer, if an entry is not dispensed with in favor of an infant and feme covert, when the act once begins to run on the ancestor, neither can the re-commencement of the action in due time, which is in lieu of an entry, be dispensed with in their favor. He cited 2 Str. 907. *Fitzgibbon*, 170, 171, 279, and *Willis's Reports*, 257, note a. 1 Lutw. 260. 15 Viner Ab. 102, notis. Consider the limitation as a power, then that power expired or was revoked by the death of the grantor, 1 Ba. Ab. 204, Co. Litt. 52, and can never be executed afterwards. The fee simple which was in the grantor, and was to be disposed of by virtue of this power, descended, on the death of the grantor, to his heir, or by his will was disposed of to Esias or his children. As a power it also ceased when the object of it was no longer attainable; the sale is to be made for the purpose of dividing the money amongst those *that are living of them four above mentioned*: and but one was living when the event happened upon which the sale was to take place. As a power also, it is void because in that part of the deed where the

the sale is mentioned last, no person is appointed to sell; and where it is first mentioned, *they that are then living of his four sons, or for want of them, any one or more of their lawful heirs of their own bodies* may execute a deed. The latter have no power unless for want of the former, *some of his sons then living*. Josiah, one of the sons, was then living; the power vested in him and expired with him, and the fee remained where it was, in the heir of the grantor, who conveyed to the defendant. Also as a power, it is now incapable of execution for another reason; the lands in the latter clause in the deed respecting a sale, are to be sold to any one or more of the grantor's four sons &c.—by the former clause, to any one or more of his sons then living when the issue of one fails, or to the heirs of their body or bodies; that is, as I understand it, to the heirs of the body or bodies of such of his sons as shall be living when the issue fails. Then, not only Josiah was to sell, he being one of the four sons then living, which he cannot now do, being dead; but he was also to sell to himself or to the heirs of his own body; which was impossible.

*Taylor, Judge.* There are many difficult points in this cause. I advise the jury to find for the plaintiff or defendant, subject to the opinion of the court upon facts to be stated by the court in case the counsel disagree. My opinion is upon the statute of limitations in favor of the defendant; but this opinion may be incorrect and in a matter of so much consequence, as it regards the law of the county. I wish for time to reflect and to form a mature judgment.

The jury found for the plaintiff, and the facts stated by the counsel on both sides, were these: In 1751, John Harrel seized in fee, conveyed by a deed in the words following: [Here the deed was stated as before.] The issue of Esias failed in 1772, by the death of Sarah, his daughter, married to William House without issue, the widow of Esias having married before. All the other grantees were then dead, except Josiah, who died in 1773. He commenced an ejectment in October, 1772, for the lands in question, against William House, the defendant, and the suit abated on his death. George, the heir at law of John, the grantor, conveyed the lands in question in fee, by deed, to William House, in 1772, who has kept possession ever since. The issue of Josiah ever since his death have been under disabilities till within three years next before the commencement of this action, in 1803. Noah, the son of David, one of the grantees, came of age and sued for the same lands by ejectment in 1782, and was nonsuited in 1783; he took possession of one third of the lands in question, marked off for the widow of Esias, but under what title he sued or entered does not appear. All the descen-

dants of Ezekiel and David, except Noah, were under disabilities from the failure of issue of Esias, till within three years last past. If the issues of all the granters whose issue exists are entitled, then judgment to be for the plaintiffs generally. If only the issue of Josiah are entitled, then judgment for them only. If none of them are entitled, then judgment to be entered for the defendant.

### *Cunningham vs. Butler,*

**T**HE defendant, master of a vessel offered in evidence a protest to shew that he was not chargeable with the cargo, having lost it in a storm. The plaintiff's counsel argued that such evidence was not admissible, for the reasons stated in Taylor's Reports, 308. 7 T. 159. Whereupon Hamilton, for the defendant cited 1 Dallas, 16. Gel. 116. 2 Dallas, 196. 1 Dallas 317. Weskett, 232. 1 Dallas, 318, 6, 9, 10. Weskett, 433, 430. 2 Valins, 222. Park, 139. 12 Reports, 63, Muses case.

*Taylor, Judge.* If a protest can be evidence in any case, it cannot be so for the captain. What is a protest? An account of the vessel and cargo given on the oath of the captain and sailors, before a notary. Suppose the captain had come to this court and made an oath for his exculpation, it would not be received: why then receive an exculpatory account of himself, taken under circumstances more unfavorable to truth. If we must receive the oath of the captain to discharge himself, why not also the oath of a defendant that he has paid the debt, or that he did not commit an assault? Such is the situation of our commerce, that our merchants are obliged to employ many foreign sailors; they are a class of men who consider custom house oaths, in relation to commercial business, as a mere ceremony. I do not say this of all of them, for I know of some honorable exceptions, but as a general rule, these remarks are correct. Shall the property of our merchants be disposed of by such oaths as these? made in the absence of the party to be affected by them, and when no one for him is on the spot to cross examine the deponents? I am decidedly of opinion that the protest cannot be given in evidence for the captain.

### *Williams vs. Ferebee.*

**T**AYLOR, Judge. If the jury are satisfied from the evidence, that the plaintiff, who was a merchant, and sold goods to the defendant, as a customer, made it a rule to charge interest at the end of three months if the principal were not then paid, they may now give interest to him after the three months.

*Littlejohn vs. Gilchrist's executors.*

**D**EBT on a bond for delivery of Tobacco, on the 24th of February, 1781. Payment in tobacco had been made at divers times up to the year 1789; and the tobacco thus delivered, though a smaller quantity than was to be delivered, was of more value in money, estimating it by the prices it bore at the several times of delivery, than the whole that was due by the bond was worth on the 24th of February, 1781, with the interest thereon. Evidence was given that the executor of Gilchrist and the plaintiff corresponded on the subject of a settlement, till the death of the executor, which was in 1801. The act of 1715, ch. 48, sec. 9, was pleaded, and payment.

*Taylor, Judge.* As to the act of 1715, I think it does not take place in such a case where the plaintiff *claims* immediately, and keeps it up by a regular correspondence and demand of payment, although seven years and more are expired after the death of the debtor before the commencement of the creditors action. As to the mode of valuing the tobacco, the general rule, no doubt is, that it shall be estimated as worth when it becomes deliverable; but here it is proved, that at the time when the tobacco should have been delivered, it was the custom and practice of merchants to keep a tobacco account, and to give credit in tobacco, not in its value in money; and if a balance of tobacco remained, to charge as much money as it was worth when it became payable. If the jury are satisfied of this, then they may estimate accordingly, because the custom will control the general rule of law.

Verdict and judgment accordingly.

*Blanchard and others vs. Pasteur's executors.*

**G**ILMOUR and Pasteur were partners in trade, though the fact was denied both now and upon the trial at law. Gilmour purchased goods of the plaintiffs, and gave a bond signed Gilmour, & Co. An action at law was instituted on the bond, after the death of Gilmour and Pasteur, against Pasteur's executors, and judgment was upon the merits in that suit for the defendant. This bill in equity was to compel payment of the money for which the goods were sold, from Pasteur's executors. The suit at law and judgment was pleaded to this bill.

*Taylor, Judge.* There could not be a recovery at law, upon the bond, against Pasteur's executors one partner, cannot bind another by bond; the plaintiff's relief was in this court under such circumstances: The plaintiff failed at law, because he had chosen the wrong jurisdiction; and if he could now be told, you cannot recover here, because of your failure at law, it would be very absurd.

Decree for the plaintiff.

*King's executors vs. Bryant's executors.*

**D**EBT upon a bond commenced in the county court, and an appeal taken to this court; and the plaintiff now proposed to prove by the subscribing witness, that a bond was given to the plaintiff the time when it was given, and that it was lost at or since the trial in the county court.

*Futs*, for the defendant, said, that as a declaration had not been drawn since the loss of the bond, and that as the first declaration made a profert of the bond; the bond so preferred to the court, must be produced in the plea of *non est factum*, and proved as in common cases. Had it been lost before the declaration, it might then have been declared on as lost by time or accident; in which case, the bond need not be produced, but might be proved as the plaintiff now proposes.

*E contra*, it was said, that if a bond be preferred in the declaration, and whilst in the office, the seal be torn off, that it shall be proved without the seal, and notwithstanding it has none: so also should it be when not only the seal, but the whole bond is destroyed or lost.

*Taylor*, Judge. Let this point be reserved, and let the proof proposed be now made, as the plaintiff's counsel propose to make it.

This was done; and the defendant then proved that the obligor was so drunk at the time, he could not stand, and did not know what he was about. But it was insisted that drunkenness alone is no objection: the law requires the party to have been drawn in to drink, and then imposed upon—3 P. W. 130.

*Taylor*, Judge. If he was so drunk at the time, that he did not know what he was about; and if in that situation he was induced to sign a paper for a debt which he did not owe, that was a *fraud*; and a fraud practised upon a man whether drunk or sober, will vitiate the instrument signed by him.—The jury will consider whether he was so imposed upon or not.

Verdict for the plaintiff; referred to the Supreme court.

*Kimball vs. Person's administrators.*

**T**AYLOR, Judge. It is in proof that the plaintiff resided in a house of the intestate in the years 1796, 1798, 1799 and 1800; that he labored in these years as a blacksmith for the intestate, and in other employments. That in 1800, he proved before a magistrate the account for that year, and two other accounts besides; which latter are not shewn. The administrator paid off the account for 1800, and took a receipt for it. The act of limitations is pleaded. This action commenced in Fe-

bruary, 1802. Three years elapsed before commencement of the action upon the accounts of 1796 and 1798. In the account of 1800, credits are given for advancements made by the intestate. The accounts for 1796 and 1798, are barred, unless the jury think from the evidence, that the account was a current one through all these years. If it was, then the act of limitations will only run from the last article in the account current: If the intestate continued to make payments, and advances all through these years, without ever coming to a settlement and liquidating the account, it is an account current: but if the account was liquidated in the time, and a balance struck, it then ceased to be current, and the three years must be computed from that time.

Verdict for the plaintiff, and judgment.

### *Christmas's administrator vs. Jenkins.*

THIS was an action to recover from Jenkins on the following facts. The plaintiff had advertised a sale of his intestate's effects, and the terms of the sale were, that the purchasers should give bond with approved sureties before the property should be delivered. A mare was exposed to sale, and a bid of £.50 was made for her. Jenkins then bid £60, and she was struck off to him as the highest bidder. He did not on that day give bond with sureties, alledging as the truth was, that he could not procure sureties. On the next day he still continuing not to offer sureties, the mare was offered for sale again, and was bid off for £43, the most that could then be obtained for her. This evidence being now given, it was contended by Jones, for the defendant, that as the property did not pass to the purchaser till after security given, that the defendant having not been able to give it, should not be compelled to pay for an article, the property whereof had not passed, nor the thing itself delivered: and that as the defendant was in a state of intoxication, his bid should not have been received; that the liquor by which he had been inebriated, was furnished by the plaintiff. This man's drunkenness was justly imputable to the plaintiff, who had furnished the means of intoxication with a view of selling the property to advantage; and that having drawn in the defendant to make an offer very injurious to himself the defendant, the plaintiff ought not to be allowed to profit of it.

Taylor, Judge. When the terms of auction are advertised or otherwise published, every one who becomes a bidder, is presumed to be acquainted with the terms, and to undertake that he will comply with them. If one of them be that, the purchaser shall give bond and sureties; he who becomes the highest and last bidder is bound to do so. He cannot excuse himself by saying he is unable to procure the sureties: he ought to

have known what he was able to do in this respect before he became a bidder. If the argument for the defendant be correct, then every bidder might refuse to give bond for the property he had purchased; and whilst on the one hand the seller would be bound to deliver the property to every bidder on security given, none of them would be bound to give the security to him. And suppose all of them should fail in this respect, shall the seller have no compensation for his disappointment, trouble and expense?—Many instances have occurred in this state, where actions have been maintained under such circumstances against delinquent purchasers; and the measure of damages is the difference between the price the defendant bid, and that for which the property sold on being a second time exposed to sale.

Verdict for the plaintiff, and damages assessed for the difference between the £60 and the £43.

### *Harwood and Wilcox vs. Crowell and McCulloch.*

**T**HIS was an action of debt brought upon an instrument in the form of a bond, with a penalty and with a condition to be void on payment of a less sum, but it had not a seal. It was objected by Mr. Daniel that debt would not lie on such an instrument, but that an action on the case was the proper one.

**MR. FITZ, *contra*.** It was lately decided in England in the case of *Bishop vs. Young*, 2 Bos. & Pull. 78. that debt would lie on a promissory note against the drawer, and that a promissory note being rendered negotiable by statute afforded sufficient evidence of consideration. He cited also the case of *Walker and others vs. Witter*. 1 Doug. 1. where debt was held to lie on a foreign judgment, although a foreign judgment is considered in the light of a simple contract debt.

**Taylor, Judge.** The action of debt lies in England upon a simple contract, by the rules of the Common Law. And although I do not remember an instance of such an action in our court, I am not aware that the disuse of such action, has been owing to any apprehension, that it could not be maintained if attempted. My opinion at present is, that it will lie. I am willing, however, that it shall undergo the consideration of all the Judges in the supreme court. Of instruments not under seal, which are exhibited as evidences of the debt, a consideration for them must be proved, if they are not rendered negotiable: if they are so, they then assume the same nature as mercantile instruments, which are themselves evidences of a good consideration.

*Verdict for the Plaintiff.*



*Sawrey vs. Murrell and others.*

THE plaintiff produced a witness and examined her, the defendant then offered a deposition, and the certificate of the commissioners stated that the person who gave notice of taking the deposition, had appeared before them and proved that legal notice had been given ; and the court decided that the certificate was insufficient, for it should have stated when the notice was given, that the court might be able to determine whether it were legal notice or not. The defendant's counsel then offered to examine one of the commissioners in court, as to what the person who gave the notice had sworn before them. The court would not permit him to be so examined, because the witness himself who swore before the commissioners might be produced. The defendant's counsel then moved that the commissioner might amend his certificate, the court said that might be done, were both commissioners present, but that one alone could not alter a certificate made by both. The defendant's counsel then called upon the witness first examined by the plaintiff, she being the plaintiff's daughter, to say whether or not, notice had not been given to the plaintiff of taking this deposition, and she failed to prove it. The defendant's counsel then called witnesses to discredit the plaintiff's witness, and the plaintiff's counsel opposed their admission, on the ground that the defendant could not discredit their own witness, and that they had made the plaintiff's witness their own by calling her to prove a distinct fact, after her first examination was over.

*Per Curiam.*—It is very correct to say that a plaintiff or defendant cannot discredit a witness produced by himself, but the reason of this rule does not apply to the case before us. If a man could discredit a witness called by himself, he might, having the means of discrediting her in his own power, pass for true that which she swore if it made for him, but destroy the effect if it made against him. Here the witness was not produced by the defendant. It would be of dangerous consequence if when produced by the plaintiff the defendant could not interrogate the witness except as to the facts which she had deposed for the plaintiff: For then all distinct facts within her knowledge, however much they would operate for the benefit of the defendant, if brought out, must remain undrawn from the witness, for fear of the defendant's being precluded from the advantage of proving her want of credit. The question asked by the defendant's counsel on the present occasion, is to be considered as an interrogatory as to a distinct fact upon the cross examination of the witness, although it was put to her after her first examination was desisted from for some time, and other witnesses examined in the intermediate time between her first examination and being called again.

The witnesses to discredit her were sworn. The court doubted for some time whether the deliverer of a notice to take depositions, could be sworn as to the time he gave notice, before the commissioners appointed to take the depositions; but several of the bar informing him that was the usual practise; the court said as it was so, he could not alter it.

*James Gee and wife and others,*

vs.

*Cumming, Warwick, & Co.*

**A**TTACHMENT. Clark had been summoned as a garnishee, and declared that a bond had been given by him to the defendants thirty one years ago: he stated the sum and the time it was payable: an issue had been made up under the direction of the court; which was, whether this bond had been paid or not, and it now came on to be tried.

*Taylor, Judge.* The garnishee's counsel relies for the proof of payment on the time elapsed since this bond was payable, which was from the time of the date. The law allows a jury to presume that a bond has been satisfied, if twenty years have elapsed since it was payable; but the time elapsed here is not to be considered like the time elapsed under the act of limitations, which makes it a positive bar. In the case of the bond, lapse of time is only presumptive evidence of payment, and the presumption may be weakened, more or less, or totally overturned by circumstances inducing a contrary presumption, or accounting for the delay. One circumstance relied upon in the present case as encountering the presumption is, that the garnishee has not sworn in his garnishment that he paid the money mentioned in the bond, which is a fact he might have sworn to, if he could have done so. Another circumstance relied upon is, that the defendants adhered to the king of Great Britain in the late war, and removed themselves from America, and were not permitted to recover till long after the war was ended, not indeed until after the making of Mr. Jay's treaty. As to the first of these circumstances, it is certainly a very persuasive one for the purpose for which it was adduced. It is said that it would be to erect a court of Inquisition to decide that a garnishee could be called upon to say whether or not he had made payment. when, were he not a garnishee, but a principal defendant, the lapse of time would form for him a sufficient proof of payment. It is unjust, it is said, to compel him to give up this and to give evidence against himself: The answer is, that it would be really inquisitorial, if the defendant, who is compelled to say whether he executed a bond or not, could not be permitted to say that he had paid it; and how is the hardship greater to extort from

him a confession of his executing a bond, the execution whereof could not be otherwise proved than to extort from him an answer as to the payment.

The second circumstance relied upon is of weight, as it accounts for the reason why the defendants did not sue for some time after the war, for the debts due to them in this country.—Much has been said by one of the counsel (Mr. Browne) of the ingratitude of those who were circumstanced as were the defendants, in withdrawing themselves from this country in the hour of distress, and in becoming the most inveterate and implacable public enemies we had, of the prolongation of the miseries of war, through their means, and of the devastations they committed through all parts of this country by fire and the sword.—Such arguments ought to have no weight; 'our courts are not created for the purpose of dealing out justice to one set of men and of refusing it to others. It would be most impolitic if we should refuse to foreigners the same justice we administer to our own citizens; for then the courts of foreign nations would also refuse justice to our citizens. Justice is represented as blind, because it sees no one, so as to distinguish him from others by its distributions. In this sense I trust the courts and juries of this country will continue to be blind, and that they will not perceive a difference between a foreigner and a native, a musliman and a christian.

*Verdict that the bond is not paid.*

### *Bradley vs. Amis.*

**T**HIS was an action for a nuisance, by overflowing the plaintiff's lands; a former action had been brought, and damages assessed, and a judgement given against the defendant.

*Taylor, Judge.* If the jury are satisfied that the defendant has caused the nuisance as stated by the plaintiff, they should assess damages for the time elapsed since the commencement of the former action to the commencement of the present one; but the damages are usually light, because the action may be repeated for every continuance of the nuisance after a former action.

*Verdict for £. 3.*

I cannot think the directions concerning the damages correct, because if the keeping up of the nuisance will afford more profit to the wrong doer than the small damages assessed by a jury, he will keep it up forever; and thus one individual will be enabled to take from another his property against his consent, and detain it from him as long as he pleases. The damages ought not to be for what the incommoded property is worth, but competent to the purpose in view; that is, a demolition of the erection that occasions the nuisance. Sometimes the profits of such erections

as merchant mills for instance, are of much greater value in one year, than the fee simple of the annoyed property. In such cases the object of the law cannot be obtained but by damages equivalent to the profits gained by the erection, or by damages to such an amount as will render those profits not worth pursuing.

*Fleming vs. Williams.*

THE defendant appealed from the county court and gave but one surety in the appeal bond. It was moved that the appeal be dismissed, because there were not two sureties.

*Et per* TAYLOR, Judge, after argument. This court in advancement of justice, can take a new bond with two sureties in place of the old one; but said, that point might be reserved for further consideration: He remembered instances of the like exercise of the court's discretion, and divers others were mentioned at the bar. In the mean time, he ordered the cause to be tried, unless an affidavit could be produced for a continuance; which being made, the cause was continued.

*Note.* In the case of an appeal from the county court of Nash, somewhere about the year 1789 or 1790, the appeal bond had but one surety, and for that cause it was moved that the appeal should be dismissed; but the court having made the enquiry, and finding that the single surety was a very competent one, they said the only object of the act requiring sureties was to make the plaintiff safe; and if one surety was really able to pay his recovery, it was better to sustain the appeal, than to reject it and do irreparable mischief to the appellant; and they did sustain it.

*Callier, assignee, &c.*

VS.

*The administrator of Jeffries.*

ON the trial of this cause at the last term, some of the plaintiff's witnesses being absent, and his cause being ruled to trial, he resorted to depositions lodged in the office by the defendant, and he was allowed to read them against the defendant without proof of notice. A juror was then withdrawn. The cause now came on to be tried again, and the defendant, after the plaintiff's evidence was gone through, offered his depositions without attempting to prove that notice was given of the taking of them, and insisted he was entitled to read them, because they had been read, and by the plaintiff in the former trial.

*E contra*—It was contended, that the reason of reading a deposition without proof of notice upon the ground of its having been read before either in this court or the county court, was

because the party for whose benefit it was taken had there either obtained the admission or made proof in the presence of his adversary that the deposition had been regularly taken—but if the party against whom it is taken uses it when pressed, because his adversary has lodged it in the office against him, and thereby declared its regularity, it is read because the party taking it is estopped to speak against it: but there is not proof except against the party estopped of its regularity; it remains good against the taker, if his adversary would use it, but not good against the adversary unless proof be made of its regularity.

*Taylor, Judge.* The reading, by the plaintiff, of a deposition taken by the defendant, is an intimation to the defendant that its regularity will not be questioned; and it would be unjust in the highest degree to take advantage of his inability to make proof of its regularity, when he has been induced by the plaintiff's intimation to leave them at home:

The deposition was read without proof of notice of the taking.

*Den, on demise of Whitehurst vs. Hunter.*

THE plaintiff deduced title to himself to the lands in question. The defendant offered a deed from one of the mesne owners, through whom the plaintiff claimed; which owner was a feme covert. The deed had no endorsement of a probate in court, or an acknowledgment by the Baron; but in the minute docket of the county court, there was an entry, purporting that the deed was acknowledged; not saying by whom or in what court. There was also an endorsement on the deed, not stating in what county court or term, purporting that the feme acknowledged the deed in court, and was privately examined, not saying by whom.

*Taylor, Judge*—(after argument.) I will *ut res magis valeat quam pereat*, give a favorable construction to the endorsement. I well understand that she was privately examined; not that she was examined in court, for that would be a private examination in open court, which is absurd. What is stated, may admit of the idea that she acknowledged the deed in open court, and was there privately examined—It is not said by whom she was examined. I will presume it to have been in the usual mode, by some member of the court. The act does not require that it should be expressed by whom. I think, therefore, that the indorsement is sufficient in these respects: the objection that the deed was not acknowledged by the husband, nor proved to be his deed, is fatal. Had there been a statement upon the minutes, that the husband acknowledged the note endorsed on the deed, I should deem that sufficient; but here it is not said

on the minutes that the husband acknowledged, but only in general terms, that the deed was acknowledged. I need not give my opinion upon the point of the county or court not being mentioned in the endorsement, stating the wife's acknowledgment and examination. The wife cannot make a deed without the consent of the husband; and it does not appear that he has executed this deed with her.

So the deed was not read.

### *Simms vs. Barefoot's executors:*

*PER curiam.* Evidence cannot be given to prove that the son of one of the obligors was in duress, and that she executed the deed to procure his enlargement; and that the other obligor executed as her surety; for the duress of the son, who is a stranger to him, shall not render his deed invalid. He relied upon Cro. 2 Ba. Ab.

*Quere*—If the surety be compelled to pay the money, cannot he recover of the mother, who induced him to become surety upon an implied promise of indemnification? And if he can recover, it seems useless to say the mother shall be discharged in the first instance, but not him; for that makes her liable indirectly to what she cannot be more so directly: either both should be discharged or neither.

### *Kennedy vs. Wheatly.*

**TAYLOR, Judge.** This is an action of trespass, for breaking the plaintiff's close, entering upon his lands, &c. and the defendant's counsel relying upon the English law, insists that an actual possession in the plaintiff at the time of the trespass committed, is necessary to be proved, to support the action. In England, all their lands are occupied, and a trespass cannot be committed but upon the possession of some one, and it must be proved who was the actual occupant, for the purpose of ascertaining the person who is entitled to the action. Here a great part of our lands are not occupied by any actual possession; and if we were to require the same proof that is required by the English law, we should expose the unoccupied lands of every person to be trespassed upon, and the timber to be cut down and destroyed to whatever extent those who were in the neighborhood thought proper, and the owner could have no remedy.

### *Sledge vs. Pope.*

**TAYLOR, Judge,** (after argument.) In this action for an assault and battery, the plaintiff purposes to give in evidence, threats which the defendant made in the presence of the

plaintiff, to be executed at a future day. The counsel for the defendant opposes the evidence, on the ground of a former decision made in this court, in the case of Bary and Ingles, which excluded testimony of a provocation given to the defendant some months before the assault by the plaintiff, by newspaper publications: that decision proceeded on the principle, that the passions of men should cool and subside in some reasonable time, and would not allow the continuance of them without a recent provocation, to be taken as a mitigation of an assault made at a distant time: but that principle is not opposed to the evidence now offered; for the object of it is to enhance the damages, because the defendant still kept alive his resentment after a sufficient time for it to cool. If an old provocation will not excuse a recent assault, a threat formerly made and recently executed, as it evinces an unreasonable continuance of heat, will induce an increase of damages on that account.

### *Hunter vs. Stroud.*

*PER curiam.* TAYLOR, Judge.—This is an action of debt on a bond. The defendant has pleaded, delivered as an escrow to be delivered to the plaintiff as his bond, if the plaintiff should win the race they had made. It does not appear that it was a play or pay race; and it is in evidence, that where it is not mentioned in the articles that the parties shall run or pay, if one fails to run, the other shall be entitled to the forfeiture of half, and that although the terms of the race be in writing. If the jury are of opinion that such are the rules of racing, and that the defendant failed or refused to run, then there cannot be a recovery upon this bond, which is for a precise sum, which cannot be diminished by the discretion of the jury; but the plaintiff is entitled to recover half the amount, as a forfeiture in another action. It is also contained in the articles that they were to run on the 25th of November, between the hours of 12 and 4 in the afternoon, and it is stated in evidence that Hunter's horse ran precisely at 4 o'clock, though one of the witnesses say about 4 minutes before 4. Where two persons agree to run or do any other act between 12 and 4, it is evident that the act will not be effectually done unless it be done between the points of time specified: if done when the time is completed within which it was to be done, it is too late; or if done at any time after the time is completed. The jury will consider, therefore, whether he did run precisely at 4 o'clock; and if so, the verdict should be for the defendant.

The jury could not agree, and a juror was withdrawn.

*Alston vs. Sumner's heirs.*

**A**FTER much argument, the court delivered its opinion as follows :—

This is a *sci. fa.* taken out against the heirs of Sumner, after a plea of fully administered, found in the original action of the administrator. The heir, at the last term, pleaded assets in the hands of the administrator, and a *sci. fa.* therefore, issued to bring in the administrator. I am of opinion the administrator is continued in the court till the heir comes in, and that no such *sci. fa.* was necessary ; but the plaintiff, at the last term, should have applied to the court to direct an issue to be made up between the administrator and heirs ; which, when made up, would have stood for trial at this term. The executor is not compelled to try the issue at the same term it is made up ; for he, like others, should have time to procure the attendance of his witnesses. As such collateral issue was not made up at the last term between the heir and administrator, let it be now made up, and the cause stand over till the next term for trial.

The issue was made up accordingly.

*Baker vs. Blount.*

**T**HIS was debt on a bond—and one Andrew Adie had subscribed as a witness ; he had been summoned, and did not attend ; a commission was issued, and when before the commissioners, he refused to depose, alledging that his papers were not in his possession ; at the next court he did not attend, and the court issued an attachment against him : hearing of this, he removed into another county. It was proved that Blount, before giving this bond, had left money with a company, of whom this Adie was one, or had lent them money under such circumstances as raised a presumption that they were to pay this debt when recovered. The truth now coming in, all these circumstances were proved to the court ; and Baker moved to be at liberty to prove his hand writing in the same manner as if he resided out of the state, being only an instrumentary witness—and after much argument,

*Taylor*, Judge, declared his opinion. The first rule of evidence is, that the plaintiff shall produce the best in his power, to exclude the idea that the better evidence remaining in his possession was not withheld because it made against him. To this rule however there are divers exceptions, founded on necessity : if a man dies, and the subscribing witness becomes his administrator or executor, or becomes blind, or removes out of the state where the process of the court cannot reach ; here, in such cases and many others, the necessity of the thing forms an



exception, and causes the presence of the witness to be dispensed with. The grounds of these exceptions do not make a better cause for exception than the cause before us; a fraud is practised to prevent the obtaining of this testimony, because if produced it would probably subject the witness to the payment of the debt; and fraud whenever attempted under the sanction of the court, should be obviated by its decisions. The witness attempts to avail himself of the practice of the court, to prevent a recovery; and it would indeed be an odium upon the law if such artifices could be effected. If a witness, when searched for, cannot be found, his hand writing shall be proved; here the witness continues to be as much absent as if he could not be found, and the reason for admitting his testimony in the case now before us is as strong as if he could not be found. Let proof be given of his hand writing. It was given, and there was

A verdict and judgment for the plaintiff.

### *Thompson vs. Thompson.*

**T**AYLOR, Judge, after argument. The plaintiff's counsel moved to set aside a nonsuit, which was suffered, because on trial the plaintiff offered an attested copy of a bill of sale for a Negro, instead of the original, and did not account for the absence of the original. The plaintiff's counsel say, that the papers were shewn to them on the day before the trial, and it did not occur to them that the original would be required; nor did they remember that it would be wanting till the trial came on—the plaintiff, they say, was therefore surprised in consequence of their overlooking the objection that was made against them.—This is not surprise, but it is *sua negligentia*, and the nonsuit ought not to be set aside.

The rule to set aside the nonsuit, discharged.

### *State vs. —*

**P**ER curiam. The Attorney General moved for a continuance, and the court is informed that the defendant has a material witness who has removed to the state of Tennessee; if he has the continuance at all it must be upon the condition of his agreeing that the defendant shall take the deposition of his witness, and that such deposition shall be read on the trial.

### *Marshal vs. Williams's executor.*

**T**HIS bill in equity stated that sometime prior to the 25th December, 1789, the complainant borrowed of the defendant's testator, £ 25, Virginia money, and gave him a bill of sale for a

Negro man, with an endorsement stating that if the £ 25, with interest should be repaid on the 25th of December, 1789, the bill of sale should be void ; but if not paid with interest on that day, then Williams should be entitled to the Negro and a further bill of sale, and should pay £ 10 more in addition to the £ 25 ; and that if the Negro should die in the mean time, the loss should be the complainants ; that the £ 25 and interest was tendered on the 29th of December, 1789, and Williams refused to receive it. This bill was filed about ten years afterwards.

*Plummer and Browne*, for the defendants, insisted this was a conditional sale, and that on the non-payment of the sum borrowed, and interest, until the 25th December, 1789, the testator was to be considered as the absolute proprietor, but bound to pay the £ 10. They cited Cal's Re. *E contra*, was cited 2 Vern. 188.

*Per curiam*. A conditional sale is when at the time of the contract the absolute property passes to the vendee, but subject to be defeated by paying the sum advanced: the Negro, until the money paid back, belongs to the vendee, and if he dies it is the loss of the vendee ; he is entitled to his services in the interim, and is not entitled to the money advanced for him, and so cannot claim the interest of it : Here the money was loaned, interest was to be paid on it, the Negro, if he died, was to be considered as the property of the complainant. He was therefore a pledge for the security of the money ; was redeemable ; and being once so was always so. He must be delivered up and his yearly value accounted for, deducting from thence the money loaned and the interest ; after each value shall be ascertained, interest must be paid on such yearly value from the time it becomes due.

*The administrator of Troughton,*  
versus  
*Hill's executors.*

THIS bill stated that M<sup>r</sup>Neil in the year 1777, being married to his wife Fanny, was called upon to take the oath of allegiance to this state or to depart—he refused so to do, and was compelled to leave the state under the penalty by law established of incurring the crime of high treason if he returned. That the said Fanny was left here, and afterwards intermarried during his life, with Troughton ; and in the year 1793, by deed, conveyed to Troughton all her property and rights to property ; and that the defendant was accountable to her for divers sums of money and articles of property due from her father's and mother's estate, under their wills. The defendant demurred to this bill, because by her own shewing, being either the wife of M<sup>r</sup>Neil or of Troughton, she could not convey by the deed men-

tioned in the bill. The plaintiff's counsel cited 2 Vern. 104, or 1 Vern. 104, and 2 Bos. & Pul. 226; and after much argument the Court said, we must take the facts stated in the bill; and although possibly the answer might vary the case so as to shew the plaintiff could not recover, yet as the bill states that M'Neil was perpetually banished, it follows that except as to the objection of the marriage, M'Neil is to be considered as to all purposes to be actually dead; and she as to all purposes as a feme sole, she may sue and be sued, acquire and transfer property: if she may do so by will, as stated in 2 Vern. 104, there is no reason why she may not also do so by deed.

The demurrer must be over-ruled; and it was over-ruled, and the defendant's ordered to answer.

Wilmington, May Term, 1806.

*M'Kinzie vs. Smith.*

**B**ILL in equity for an injunction against an execution at law. The cause being now called in course, Mr. *Gaston*, for the plaintiff, moved the court that the answer might be referred to the master for impertinence; saying he had perused the answer, and a great part of it was irrelevant to the matter in controversy.

*E contra.* Whatever the practice may be in England, it is manifest we have not adopted nor cannot adopt all the English rules of practice without great inconvenience: Our rules should be adapted to our circumstances. Here the court is open but three days; it would operate as a delay of six months to the common law execution: Should such a reference be made without examining upon the bill and answer whether the injunction should be dissolved or continued? Let us read them and consider of that part, and afterwards let the reference prayed take place, and let the defendant pay for his scandal or impertinence if he has been guilty of either.

*Per curiam.* Let the reference take place, and the report be made on the second equity day of this term; and if not then made, the bill and answer shall be read and the injunction dissolved or continued. This was on the first equity day.

*Dudley vs. ———*

**T**HIS was an action for misconduct of the master of plaintiff's vessel. A trial was had at this term, and a verdict given for the plaintiff, and £70 damages assessed; and the defendant's counsel moved an arrest of judgment; for that the writ had been issued and signed by the deputy clerk in his own name,

though it bore test in the name of the principal clerk. The defendant's counsel relied upon the constitution of the state, section 36, "all writs shall bear teste and be signed by the clerks of the respective courts." *E contra* were cited 5 Geo. 1, ch. 13, enforced by 1777, ch. 2, sec. 35—1768, ch. sec. 45.

The plaintiff's counsel admitted that error had been committed in issuing the writ, but the words of 5 Geo. being, "that where any *verdict* hath been or shall be given in any action, suit, bill, plaint, or demand, the judgment therefor shall not be staid or reserved, for any defect or fault, either in form or substance, in any bill, writ, original or judicial, or for any variance in such writs from the declaration or other proceedings," such error was cured by the verdict, or rather could not be resorted to after verdict: again, the defendant having appeared and pleaded to issue, that is, a waiver of all objections to the process, and he can never afterwards make any such objections. 1 Str. 155. Salk. 59. Str. 157. Yelv. 36. 1 Livz. 201, 261. 2 Wash. 79. 1 Vez. 386. 8 T. 356. 1 E. 642, 649.

*E contra.* The defendant's counsel said the act of 5 Geo. 1, ch. 13, being enforced by the act of 1777, is to be considered as then enacted by the legislature; and as it dispenses with what the constitution requires, is a void act: it says the defendant shall not take advantage after verdict, of a substantive defect in the writ: the constitution makes the writ to be no writ, if not bearing teste and signed by the clerk. Then there is no writ to give the court jurisdiction.

Referred to the Supreme Court.

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**John Stanley,**  
**James Seawell,**  
**Alexander Sorsby,**  
**Joseph B. Skinner,**  
**Wm. Slade,**  
**Isaac Stokeley,**  
**James Green Stanly,**  
**James Sasser,**  
**Edwin Smith,**  
**Thomas Salmond,**  
**Robert Starke,**  
**Edward Scott,**  
**Thomas Stuart,**  
**Robert Searcy,**  
**Bennet Searcy,**  
**Wm. Smith,**  
**Thomas Swann-**  
**Robert F. N. Smith,**  
**Hugh Simpson,**  
**G. Shober,**  
**David Shelby,**  
**M. Sampson,**  
**James Stewart,**

**Wake**  
**Newbern**  
**Franklin**  
**Nash**  
**Edenton**  
**do.**  
**Pasquotank**  
**Newbern**  
**Wayne**  
**Johnston**  
**Camden, S. C.**  
**Columbia, S. C.**  
**Knoxville, Ten.**  
**Jonesborough, Ten.**  
**Nashville**  
**do.**  
**do.**  
**do.**  
**do.**  
**Caswell**  
**Salem**  
**Gallatin, Ten.**  
**Sampson county**  
**Richmond**

### T.

<b>William L. Thomas .. . . .</b>	<b>Chesterfield, S. C.</b>
<b>Jordan Thomas</b>	<b>Franklin</b>
<b>Thomas Threadgill,</b>	<b>Anson</b>
<b>John D. Toomer,</b>	<b>Wilmington</b>
<b>James Trimble,</b>	<b>Knoxville, Ten.</b>
<b>Eli Talbot,</b>	<b>Nashville, Ten.</b>
<b>Leervy Taylor,</b>	<b>Jonesborough, Ten.</b>
<b>John Tipton,</b>	<b>Blountsville, Ten.</b>
<b>David Tearsley,</b>	<b>do.</b>
<b>Robert Troy,</b>	<b>Anson</b>

### V.

<b>Abner Nash Vail .. . . .</b>	<b>Edenton</b>
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### W.

<b>William Williams, B. C. . . . .</b>	<b>Franklin</b>
<b>Joshua G. Wright,</b>	<b>Wilmington</b>
<b>James Walker,</b>	<b>do.</b>
<b>Abner Whitney,</b>	<b>Pasquotank</b>
<b>Wm. Wilson,</b>	<b>do.</b>
<b>Benjamin Woods,</b>	<b>Newbern</b>
<b>Willis Watson,</b>	<b>Smithfield</b>
<b>Joseph Wilson,</b>	<b>Randolph</b>

# SUBSCRIBERS NAMES.

S. Wilds,	Cheraw, S. C.
John D. Witherspoon,	do.
John Lide Wilson,	do.
Robert L. Witherspoon,	do.
Joseph Williams, jun'r,	Surry
Thomas Williamson,	Lincoln
John Williams,	Knoxville
Hugh L. White,	do.
John Wilkinson,	Maryville, Ten.
S. Williams,	Fort Blount, Ten.
Chapman White,	Franklin, Ten.
J. Whitside,	Nashville
J. Wharton,	do.
Robert White,	do.
Nathaniel W. Williams,	do.
Thomas G. Watkin,	do.
Robert Williams,	Raleigh
J. Winchester,	Cragfant, Ten.
Reuben Wood,	Randolph
M. D. Williams,	Caswell
Abner Weatherly,	Guilford

Y.

John Yancey .. .. . Caswell

*A. R. T.*

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